



POLICE DEPARTMENT

November 18, 2008

MEMORANDUM FOR: Police Commissioner

Re: Detective Thomas Aasheim
Tax Registry No. 898871
Detective Borough Bronx
Disciplinary Case No. 81891/06

The above named member of the Department appeared before me on October 2, 2008, October 3, 2008 and October 7, 2008, charged with the following:

1. Said Detective Thomas Aasheim, assigned to 45th Precinct Detective Squad, while on duty on or about December 19, 2004, did fail to safeguard his computer code thereby allowed another member of service to wrongfully and without just cause make inquiries in the FINEST system, which were not related to the official business of the Department. *(As Amended)*.

P.G. 203-10, Page 1, Paragraph 4 – PUBLIC CONTACT—PROHIBITED
CONDUCT—GENERAL REGULATION

2. Said Detective Thomas Aasheim, assigned as indicated in Specification #1, while on duty, on or about July 19, 2005, did wrongfully cause false entries to be made in Department records, to wit: said Detective listed in a DD5 report that he spoke via telephone to a witness involved in an assault and that said witness could not identify a perpetrator, when in truth, the contact telephone number contained in the DD5 did not belong to the witness.

P.G. 203-05, Page 1, Paragraph 4 – PERFORMANCE ON DUTY—GENERAL
GENERAL REGULATIONS

3. Said Detective Thomas Aasheim, assigned as indicated in Specification #1, while on duty, on or about the date indicated in Specification #2, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department to wit: said Detective conducted an improper investigation into an assault case when he neglected to ascertain a witness' correct contact number and/or attempt to locate that witness.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT—PROHIBITED
CONDUCT—GENERAL REGULATION

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4. Said Detective Thomas Aasheim, assigned as indicated in Specification #1, while on duty, on or about May 6, 2006, did wrongfully and without just cause prevent or interfere with an official Department investigation.

P.G. 203-10, Page 1, Paragraph 2(D) & 3—PUBLIC CONTACT—PROHIBITED CONDUCT

5. Said Detective Thomas Aasheim, assigned as indicated in Specification #1, while on duty, on or about the date indicated in Specification #4, during an official Department investigation conducted by Detective Randy Katakofsky of the Internal Affairs Bureau Group #22, pursuant to the provisions of Patrol Guide Section 118-9, did wrongfully make false and misleading statements, to wit: said detective said in sum and substance that a complainant, identity known to the Department, had a telephone number for a witness, identity known to the Department, that was different from the contact number listed on the complaint report and that the complainant provided said number to the detective when he came into the station for a photo array; when in truth, said complainant stated he never brought a telephone number into the precinct. *(As Amended)*.

P.G. 203-08, Page 1, Paragraph 2—PUBLIC CONTACT—GENERAL

6. Said Detective Thomas Aasheim, assigned as indicated in Specification #1, while on duty, on or about the date indicated in Specification #4, during an official Department investigation conducted by Detective Randy Katakofsky of the Internal Affairs Bureau, Group #22, pursuant to the provisions of Patrol Guide Section 118-9, did wrongfully make false and misleading statements, to wit: said detective said in sum and substance that he was able to contact a witness, spoke to that witness and that the witness told him that he (witness) did not see the perpetrator strike the complainant; when in truth, said witness stated he was never contacted by anyone from the 45th Precinct Detective Squad. *(As Amended)*.

P.G. 203-08, Page 1, Paragraph 2—PUBLIC CONTACT—GENERAL

The Department was represented by Michelle Y. Alleyne, Department Advocate's Office, and the Respondent was represented by James Moschella, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification No. 1 and Not Guilty of Specifications Nos. 3 through 6. Specification No. 2 is dismissed.

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INTRODUCTION

On June 30, 2005, James McGuire, while driving with his wife in the Bronx was the victim of an assault. After a traffic related incident McGuire, who was seated in his car, was punched numerous times in the eye through the open car window by his assailant. The Respondent, a detective working in the 45 Precinct Detective Squad was assigned to investigate that incident. The main charges in this case stem from what happened in that investigation.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called James McGuire, Anthony Focarile and Detective Randy Katakofsky. The Department also offered into evidence copies of "LUDS and Tolls" for the telephones of Focarile and the 45 Precinct, Department's Exhibit (DX) 1, a DD5 regarding complaint #4888 from the 45 Precinct, DX 2, an audiocassette of the Official Department Interview of the Respondent, DX 3A, and the associated transcription, DX 3B.

James McGuire

McGuire is presently employed as a Senior Court Clerk for the New York State Courts.

He testified that on June 30, 2005, he was on Revere Avenue in the vicinity of Philip Avenue in the Bronx. His wife was present as a passenger in the vehicle as he was driving her to a Weight Watchers meeting. As he was driving, he stated that a "car came out of a driveway at a high rate of speed almost striking my vehicle causing me to swerve and to come to almost a complete stop." McGuire sounded his horn to express his aggravation and the motorist in the other vehicle proceeded down Revere Avenue. Further down the road, in the intersection, this individual had stopped his vehicle and became engaged in an argument with a pedestrian. McGuire stated that this caused traffic to become completely obstructed.

McGuire stated that at this point he was about 100 feet away from the stopped vehicle in the intersection. He explained that he had to stop his vehicle because "nobody could proceed through the intersection because he was in the way making a big commotion." McGuire stated that he told the driver who was blocking the intersection and engaging the pedestrian in the altercation to "...leave that woman alone." At this point, the

individual came running towards him, reaching into his vehicle while grabbing him by the shirt and commenced a series of repeated punches to his left eye. McGuire indicated that he was seated in his vehicle while this happened:

As he was being punched repeatedly, McGuire attempted to remove the assailant's arm from the inside of his vehicle. He was not successful in doing so because he was trying to prevent his car from rolling forward at the same time. McGuire's wife began to yell at the assailant, and eventually he stepped back. McGuire got out of his vehicle at this point and confronted the perpetrator, telling him that he was a coward and invited him to a "fair fight right here in front of the intersection." This offer was declined, as the individual "turned around and ran back across the street, got back into his vehicle and drove off at a high rate of speed."

McGuire proceeded to follow the individual across the intersection and to his vehicle. He noted that his vehicle was a Cadillac Escalade and recorded its license plate number. He testified that at this point, he was bleeding heavily from his eye and his vision was inhibited. He noted that there was a long line of cars stopped because of the incident and he took notice of the gentleman behind him and engaged him in conversation. He asked the man if he had seen what transpired and asked if he could serve as a witness to tell the police what had occurred. McGuire stated that the man said, "...Sure, I would love to be a witness" and he thereafter obtained his name and contact information. Asked if he could recall the man's name, McGuire stated that it was an Italian name and began with the letter "F." He thereafter agreed that the name was Focarile.

Mrs. McGuire had telephoned the police via cellular phone during the incident. They responded and McGuire told them that a stranger punched him in the eye repeatedly. He furnished a police officer with the license plate number of the assailant's vehicle and

other relevant information such as the witness' name and number. He acknowledged that he was later contacted by the Respondent and asked to come into the precinct to view a photo array. He arrived at the 45 Precinct with his wife, and explained that he went up to the "squad room" on the second floor. While Mrs. McGuire sat in the squad room, McGuire went into the hallway with the Respondent to look at the photo array. He did not make a positive identification of the individual who assaulted him. While he was told by the Respondent to "try your best," McGuire testified that he knew he could not make an adequate identification because he "...didn't really get a good look at him."

The Respondent then asked Mrs. McGuire to look at the photo array. McGuire stated that she went to the hallway for about 30 seconds and then came back to the squad room and said she saw the assailant in the array. He believed that the Respondent also remarked that Mrs. McGuire had picked out the correct individual. After the two had viewed the photo array, the Respondent informed them that he would "pursue an investigation based on all the information that I had given him, and basically that was the end." McGuire was asked:

Q: You said that the detective told you he was going to pursue the case with all the information that you had given him. What information? What are you referring to here?

A: I guess the description of the vehicle, the plate number, the witness. I explained my wife had been sitting there and saw the whole thing.

McGuire did not recall the Respondent asking him about the man who had witnessed the incident and he did not recall the Respondent telling him that he was having difficulty getting in contact with this individual. McGuire did not recall if he gave the Respondent this witness' telephone number, stating, "No. I don't recall that. I don't recall that."

Regarding the disposition of the investigation, McGuire stated he tried contacting the Respondent numerous times to no avail. He reiterated that regarding his communications with the Respondent, he called once to identify himself and to request he look at a photo array, and then a second time to make the appointment to view the photo array. Subsequent to the viewing of the photo array, McGuire explained that his efforts to reach the Respondent were unsuccessful.

At some point, McGuire testified that he was contacted by Detective Katakofsky of the Department's Internal Affairs Bureau. He told Katakofsky that he had a ten to fifteen minute encounter with the Respondent, when he and his wife looked at a photo array and that he had been "reaching out to the detective periodically to find out what was the status of the investigation."

Upon cross-examination, McGuire agreed that his presence at this proceeding was compelled by a subpoena. He also agreed that prior to being assaulted, he had an incident with the same individual when that person exited a driveway at a high rate of speed almost striking his vehicle. McGuire testified that the location of this incident was on Revere Avenue, about halfway prior to the intersection of Philip Avenue. There was no vehicle accident here as the two vehicles never came in contact. The second incident occurred thereafter, in the middle of the intersection of Revere Avenue and Philip Avenue.

McGuire again explained that the individual was out of his vehicle in the middle of the intersection, blocking traffic with his vehicle and having an argument with a female pedestrian. He was assaulted when he told the individual to cease what he was doing. He agreed that numerous other people had stopped and that one of the individuals was Mr. Focarile, the witness. McGuire stated that he was in the vehicle directly behind his.

He indicated that after he was assaulted, he challenged the man to a fight and the man ran back to his car. McGuire acknowledged that he did not get a good look at the man's face and that he required ten stitches in his eyelid. McGuire stated that the assailant's father was also at the scene yelling at him [McGuire] and later told him that he "deserved everything you got" and remarked "I'm a witness to nothing." McGuire agreed that he had a conversation with Focarile, the motorist behind him, who agreed to be a witness and supplied his name and contact information which was written down by McGuire on a piece of paper in his pocket.

McGuire indicated that he did not call the gentleman after the day of the assault. He testified that he recently attempted to locate the piece of paper containing the telephone number but that he was unsuccessful in doing so. However, McGuire stated that at the scene of the assault, as he was in the ambulance a police officer asked him some preliminary questions. He explained that he told the officer about the witness and gave him the telephone number that he had recorded. He agreed that he spoke the digits of the telephone number to the officer and saw him writing it down in his memo book. He acknowledged that he placed the piece of paper with the witness' telephone number in his pocket and that he may have even put it in his wallet amongst where he keeps similar materials.

The Respondent was not present at the scene of the assault. McGuire agreed that prior to going to the precinct to view the photo array, he was in contact with the Respondent. Specifically, the Respondent called him and introduced himself and indicated he had been assigned the case and that he would conduct an investigation. McGuire acknowledged that initially, he told the Respondent that he was in too much pain to come to the precinct to view a photo array and that there were subsequent phone conversations to

arrange for a time to come in. McGuire agreed that there were a series of phone calls between the two.

On the day that he and his wife went to the 45 Precinct, McGuire testified that he went upstairs and the Respondent was waiting for him. He concurred that after being shown the photographs he was unable to positively identify the individual who assaulted him. McGuire said that the Respondent told him, "...at least give it a shot...do the best you can." He agreed that the Respondent was not "blowing him off." On the day that he went to view the photo array, McGuire believed that he maintained the piece of paper with the witness' name and telephone number, but upon inquiry from the Court, he did not recall if he had it on that date. McGuire stated, "I probably would have carried that with me. Any help I could be."

McGuire did not recall all of the conversations that he had with respect to the assault case. When asked if it was possible if he gave the correct witnesses' phone number to the Respondent on the day he viewed the photo array, he stated, "Sure. Sure it is." He agreed that he later saw the individual who assaulted him on the front page of the newspaper. Specifically, that he was shot and killed by the State Police at the same exact location where he almost hit his car coming out of a driveway.

McGuire spoke to Katakofsky from Internal Affairs "many times" and stated that it was more than a year after the assault that the conversations commenced. He agreed that Katakofsky never showed him a photo array, stating that only the Respondent showed him photos.

The Court asked McGuire if he received any documents from the Department about the case, and he replied in the negative and indicated that he never even knew the "61" number. He acknowledged that after he looked at the photo array his wife was asked to

take a look. He stated that she identified the perpetrator and he knew this because she told him. The Respondent also told McGuire that his wife had picked out the correct individual. McGuire acknowledged seeing a story in the newspaper about a man named Londonio, and recognized the picture of the individual to be the man who assaulted him.

Anthony Focarile

Focarile is presently employed as a computer programmer in the Bronx.

He testified that on June 30, 2005, he was driving with his wife to his house on Philip Avenue, "about seven houses away from Revere." He explained:

What happened was I pulled up, I was the third vehicle, and as I pulled up I saw that the traffic was stopped at a stop sign. Nobody was moving. And there was a gentleman basically inside the driver's window of the first vehicle. I stepped out of my vehicle to see what was going on, and the gentleman turned away from me and walked to his vehicle and jumped in his vehicle and took off. At that time, Mr. McGuire came out and was all bloody.

Focarile explained that he learned of McGuire's name because he spoke with him at the scene of the incident. He said that McGuire told him somebody had assaulted him.

Focarile testified that he did not see the front or the side-view of the assailant's face. He said he saw the back of the person's head. He gave McGuire his name and number at his request, specifically, a cellular phone number of [REDACTED]. He stated that this was his cellular phone number up until June of 2008 when he changed it.

Focarile stated that due to the close proximity of his house to the scene of the assault, he was present for the entire time. He further explained that McGuire had a door in the back of his pickup truck and that he wrote his telephone number directly on this door. He was not aware if McGuire copied this information down himself. Upon the

police arriving, Focarile stated that he told an officer that he did not see the man's face and also provided the officer with his cellular phone number of [REDACTED]

Focarile had no recollection of speaking to a detective from the 45 Precinct Detective Unit, nor did he recall any conversation with the Respondent. He did not call the detectives on June 30, 2005 or subsequent to that date, however, he explained that he telephoned the 45 Precinct on June 30, 2005, to report the incident between McGuire and Londonio. He dialed the precinct from his cellular phone, [REDACTED] Besides the patrol officers at the scene of the assault, Focarile had no contact with any members of the Department regarding this case other than Katakofsky of Internal Affairs. He stated that he told both the patrol officer and Katakofsky of his inability to identify McGuire's assailant.

Regarding the individual who assaulted McGuire, [REDACTED] Focarile asserted that he never knew him and had never seen him before. He indicated he was never threatened regarding the assault case, nor did anyone ever tell him not to provide information in the case.

On cross-examination, Focarile acknowledged that his cellular phone number was not [REDACTED] on the date of the assault and that he gave his number as [REDACTED] to the patrol officer. He explained that he called the 45 Precinct directly as opposed to 911 because he "knew the number to the precinct" and that he knew this number because he lived in the confines of that command. He explained that he has used the number before and knows it by memory. It is not stored in his cellular phone. He was unable to recall how many times he had telephoned the precinct prior to June 30, 2005.

Focarile agreed that he had discussed the incident with Katakofsky prior to the day of this trial, and further agreed that the two were in the hall outside of this Court prior to him offering testimony. Focarile indicated that the two were not discussing the case but

rather the fact that Katakofsky had put on so much weight. On a prior conversation with Katakofsky, Focarile informed him that he had telephoned the 45 Precinct on June 30, 2005. He could not recall the date that he had this conversation but stated that it was after the assault had happened and before the date of this proceeding. There were several conversations with Katakofsky.

Focarile denied ever telling Katakofsky that he knew [REDACTED] from the neighborhood, and similarly denied telling him that he saw a profile view of [REDACTED] on June 30, 2005. Focarile testified, "I don't know who [REDACTED] is, and the only way I found out who he was was when his face was pictured all over the newspaper."

When asked if he had a criminal record, Focarile responded that he did. He was last convicted of a crime in July of 2008, specifically, possession of cocaine in the Bronx. This offense occurred within the 45 Precinct. Focarile acknowledged that he hangs out in the confines of the 45 Precinct and frequents establishments therein. Focarile explained that he received a fine for his conviction of possessing cocaine and that the possession occurred on June 28, 2008. He stated that it was the first time he had possessed cocaine. Sometime between 2001 and 2002, he pleaded guilty to possession of marijuana as a violation and was sentenced to a fine. Around April 21, 2000, he was arrested in Ohio for preparation of drugs for sale. He pleaded guilty to felony charges and received a sentence of five years of probation. He explained that this case came about when he was traveling through Ohio for the purpose of trafficking marijuana from Arizona to Ohio and it did not involve any individuals residing in the 45 Precinct. Additionally, Focarile was arrested for assault sometime between August and September of 2007 and this occurred in the confines of the 45 Precinct. In that case, he indicated that he stepped out of his vehicle on Bruckner Boulevard in order to assault a pedestrian and later plead guilty to "a minor assault

charge.” He asserted that he was not purchasing narcotics when he assaulted this individual. Other than the four aforementioned convictions, Focarile did not recall pleading guilty to any other criminal offenses. He stated he is 30 years old.

Focarile indicated that he testified on direct examination that he did not have a recollection of being contacted by anyone regarding the assault case. He was asked:

Q: Is it possible you spoke with an individual about this case and just don't recall as you sit here today, Mr. Focarile?

A: If I spoke with Mr.—the detective, I am sorry, I don't know his name.

Q: Aasheim.

A: Aasheim, I'm sorry. Detective Aasheim. If it was a brief conversation, a 30 second conversation because I do work nights, then I might not recall it. He might have called me during the day, just asked me, and I said I did not see the gentleman and hung up.

Focarile did not actually see the perpetrator and expressed again that he did not know who [REDACTED] was and that he would be unable to pick him out of a photo array.

On re-direct examination, Focarile acknowledged his criminal history and stated that he willingly gave his information to McGuire on the date of the assault. He also testified that he approached a patrol officer at the scene of the incident and informed him of his observations. He reiterated that he had no recollection of speaking to the Respondent regarding the case and that he only remembers speaking to Detective Katakofsky.

Detective Randy Katakofsky

Katakofsky has been a member of the Department for eight and a half years and is presently assigned to Group 22 of the Internal Affairs Bureau where he has been so assigned for approximately three years.

Katakofsky stated that he conducted an investigation of the Respondent. He explained how the case came about, stating that he was conducting an investigation regarding associations between members of the 48 Precinct and the Lucchese crime family. There had been a shooting between members of the New York State Police and [REDACTED] in which [REDACTED] was killed. The investigation of the circumstances of the shooting revealed an allegation that a member of the 45 Precinct was furnishing [REDACTED] with information. Katakofsky proceeded to conduct an interview of an individual who was involved in an undercover narcotics operation and this individual was unaware of any corruption in the 45 Precinct. A subsequent investigation and interview of an individual who was an associate of [REDACTED] revealed that "...there was an assault that took place and that assault was taken care of against [REDACTED]."

At this point, Katakofsky examined the 61 and the DDS's from the assault. He ascertained that the case had been closed as "no identification." He contacted the complainant, McGuire, and asked him if he had been threatened into not making an identification. McGuire told him that no such threats were made. Katakofsky also took note that the 61 had the name of a witness and a telephone number. Upon calling the number on the 61, he reached a gentleman who had "no idea what I was talking about." He indicated that the number listed on the 61 that he called was [REDACTED]. Katakofsky conducted research and located an address for Focarile, went to this address and left his card with his father. Later that day, Focarile contacted Katakofsky. He stated that the correct number was similar to what was written on the 61, however, "one of the numbers was different."

Katakofsky asked Focarile if he had been threatened to not speak to the police or make an identification regarding the assault, and he replied that he had not been threatened

and said, "...no one has ever called me." He explained that he asked Focarile this question because the initial investigation indicated the case was a "mob type case." The DD5's regarding the case "...indicated that he [Focarile] was interviewed and he didn't recall the incident." Focarile told Katakofsky that he was present at the scene, he saw what occurred and that from a profile view believed the perpetrator to be [REDACTED] Katakofsky indicated that he had a few conversations with Focarile and that the first conversation was January of 2006 where Focarile stated he had never talked to anyone from the 45 Precinct or the Department until Katakofsky called. Asked specifically if he spoke to the Respondent or Detective Francese, Focarile said he had not.

Katakofsky spoke to McGuire more than once, but less than five times. He told Katakofsky about how he and his wife viewed a photo array at the 45 Precinct and that he was not able to identify anyone, however, his wife could. Mrs. McGuire confirmed this when she spoke to Katakofsky. The McGuire's explained that they were each shown the photos individually in the hallway and Katakofsky was told that it took Mrs. McGuire "about two seconds" to positively identify [REDACTED] Katakofsky spoke with McGuire before Focarile because the contact information for Focarile was incorrect initially. Katakofsky did not receive a telephone number from McGuire, and McGuire stated that the Respondent told him that he was having trouble locating Focarile. Some of the McGuire and Focarile conversations were memorialized on audiocassette.

After determining from Focarile that he had never been contacted, a larger investigation ensued. Among other things, Katakofsky obtained subpoenas for LUDS and tolls¹ on the Respondent's home phone, cell phone, and Focarile's correct and incorrect

¹ At the Court's request, Katakofsky explained that "LUDS and tolls" are records of local and long distance telephone calls: incoming and outgoing for cellular lines and outgoing only for landline numbers.

telephone numbers. The purpose in obtaining these records was to determine if there were any phone calls to or from Focarile's telephone numbers from the 45 Precinct. Katakofsky explained that the records revealed that the 45 Detective Squad had contacted Focarile's incorrect number three times and that Focarile contacted the 45 Precinct himself on one occasion. Katakofsky indicated that the subpoenas which he requested were issued by the Bronx County District Attorney's Office Rackets Bureau, due to the fact that the investigation was criminal in nature. There were two subpoenas for telephone records from the 45 Precinct which covered the time periods of June of 2005 to "at least" April of 2006.

Further to requesting LUDS and tolls for the 45 Precinct, Katakofsky received records listing "40 or 50 phone numbers from the command." When he informed Verizon, that he did not request that many numbers, he was told "when you order the main number attached to one giant account, you will get the extensions on every subsequent phone number." He said, "I had every phone number in the precinct." The subpoena for the 45 Precinct was for outgoing calls only; Katakofsky explained that he already had requested LUDS and tolls for Focarile's cellular line which would display both the incoming and outgoing calls. In addition, requesting incoming call details for landline phones is approximately \$500 a day.

Katakofsky was asked to examine the LUDS and tolls records. He recognized them to be records belonging to [REDACTED] Focarile's correct and incorrect numbers, and the 45 Precinct. He explained that he was able to recognize the records because he generated the reports using a program. The reports list a target telephone number, target name, a dialed number and then a dialed name as well as the frequency the number was dialed. Katakofsky said that there were no phone calls from the 45 Precinct to Focarile's

correct number. There was one telephone call to the 45 Precinct telephone switchboard, "the actual precinct," from Focarile's cellular phone.

Katakofsky explained the manner in which he received and organized the LUDS and tolls information. He testified that Verizon sent him a disc and he puts the disc into a program that he has. The program subsequently organizes and computes the telephone numbers and generates reports. Katakofsky inputted Focarile's number into the program so as to identify instances where it may have been dialed by any number from the 45 Precinct contained on the disc from Verizon. He reiterated that he had records from what he believed to be every phone number in the 45 Precinct, in addition to the correct and incorrect Focarile cellular phone numbers, and explained the incorrect Focarile number "at a frequency of three times" was contacted by the 45 Precinct Detective Squad. Regarding the call between Focarile's correct cellular phone number and the 45 Precinct, Katakofsky stated that he specifically examined this call and determined it to be an outgoing call from Focarile to the Precinct.

During *voir dire* examination of the telephone records by Respondent's counsel, Katakofsky again acknowledged that in response to the subpoenas, he received a disc from Verizon and inputted the data on the disc into a program. Katakofsky stated that the program is called "Penlink"² and explained that he had used this program prior to June of 2005. He agreed that there were no dates or time periods on the documents, but explained that this was by his doing. Specifically, Katakofsky stated that it was "my format" and that the Penlink program allows a user to select the manner in which the report is to be generated. He indicated that due to the fact that the 45 Precinct had numerous telephone lines, it was simply easier to generate the reports by frequency. Otherwise, the report

² Appears in transcript as "Penlik."

would have been "about 10,000 pages long." Katakofsky agreed that in looking at the report, there was no way to determine what date or time the call was made.

Regarding the 61 that was generated for the assault, Katakofsky agreed that the document reflected phone calls from the 45 Precinct Detective Squad to this number on three occasions. It is not known who made these calls. Upon inquiry from the Court, the witness indicated that the document containing the telephone calls was "hundreds" of pages long. During further questioning, Katakofsky indicated that when using the Penlink program, he gets to "pick what goes in the boxes" with respect to the captions that appear on the report. He further clarified that the report contained the actual and incorrect Focarile telephone records obtained via subpoena.

Further *voir dire* questioning on the telephone records revealed that Katakofsky did not manually input the telephone data; he was relying upon the information contained on the disc that was put into the program. Specifically, when the report indicated that extension [REDACTED] in the 45 Precinct Detective Squad contacted the wrong Focarile telephone number, he arrived at this conclusion because the computer said so. In response to the Court's inquiry, Katakofsky stated that the highlight on page 500 of the records, "...just shows that there was communication" between Focarile's cellular phone and the 45 Precinct. There was no date available.

During continued direct examination, Katakofsky reiterated that the disc he received from Verizon encompassed the entire time that was requested on the subpoena. He testified that the disc is in unreadable format and the Penlink program converts the data to a readable format. He stated that he is the only person in his command that operates the Penlink program and at the time of the investigation herein, he had been using it for about six months. Katakofsky stated that he also requested a subpoena for the Respondent's

home and cellular numbers, in addition to Detective Francese's home and cellular numbers in the event that the two "took work home and dialed from their house or their cell phone."

Regarding the Respondent's Official Department Interview, Katakofsky stated that the Respondent, when confronted with Focarile's statement that he had not ever been contacted, stated that he had spoken with him. During this interview, the Respondent also listened to a recorded telephone call between Katakofsky and Focarile where Focarile stated that he was never contacted regarding the McGuire assault case. The Respondent was given the relevant warnings regarding making false statements and again stated that he did speak with Focarile. Regarding a DD5, DX 2, which stated that the Respondent spoke with Focarile, Katakofsky stated that the Respondent was presented with the document and agreed that it reflected what he recalled in closing the case. Further, the Respondent stated during his Official Department Interview that he closed the case out because "the witness was unable to identify anybody." This DD5 was obtained by IAB when a lieutenant from Katakofsky's command went to the 45 Precinct and retrieved it.

On *voir dire* examination of the DD5 that was presented during the Respondent's Official Department Interview, Katakofsky knew that the document was not the original that was prepared. He did not believe that the Respondent stated during the interview that the DD5 was not prepared by him. He acknowledged that after learning that the case folder for the McGuire assault was missing, he interviewed a supervisor for the 45 Precinct Detective Squad who admitted that DD5s had to be recreated. Katakofsky thereafter agreed that the DD5 was not prepared by the Respondent, but stated that he agreed the wording looked familiar. He had no recollection regarding the Respondent acknowledging if he created and signed the document. Katakofsky clarified that this exhibit, DX 2, was present at the Respondent's Official Department Interview, but that the Respondent did not

initial it to signify he reviewed it. He also added that he had some DD5s on a computer, phone records on computer and papers with him. When asked by the Court if he marked the document in any way while asking questions about the document in the interview, Katakofsky stated he did not.

During further direct examination, Katakofsky stated that the Respondent's Official Department Interview occurred after speaking to the two civilians (Focarile and McGuire) and that it was documented on an audio cassette. Katakofsky recognized the tape and transcript (DX 3A and 3B, respectively), in that it represented the Respondent's Official Department Interview.

Regarding other aspects of his investigation, Katakofsky stated that he determined an "allegation of computer misuse, failing to safeguard code." To that end, he requested checks be performed via MISD³ with respect to any computer queries made by the Respondent, specifically, that it "would show if any of the cops ran certain individuals, or if those individuals were run by any cops." This investigation revealed that the Respondent's code was used "to run another Detective's child's arrest," specifically, Detective Francese's daughter. Katakofsky explained the process to do a check of a member's computer queries. He stated, "I submit a 49 to MISD, and they will filter it out to the various units within MISD who query certain systems within the Department." The time frame was most likely an 18 month period that was examined.

Katakofsky stated that Mrs. McGuire informed him that she identified [REDACTED] in the photo array at the 45 Precinct. He could not recall if he informed the Respondent of this fact during his Official Department Interview, but stated that the Respondent stated that Mrs. McGuire "really didn't make the identification. She said she would say that that

³ Management Information Systems Division

was the guy." Mrs. McGuire told Katakofsky the opposite, that she identified [REDACTED] in "two seconds."

During cross-examination of Katakofsky, he acknowledged that the assault on McGuire occurred at the end of June of 2005. He also agreed that the Respondent was not present at the scene of the assault and that it was a patrol officer who prepared the complaint report (a "61") of the incident, RX A. Katakofsky stated that he obtained this document further to his investigation by "pull[ing] it up in the 61 database, the Omni system." With respect to this document, Katakofsky identified errors with respect to the date of occurrence and the fact that Focarile's name and telephone number was incorrectly listed. Furthermore, Katakofsky agreed that a search of the incorrectly listed name for Focarile would not yield any results for Focarile. The perpetrator was also listed as "[REDACTED]" as opposed to the actual [REDACTED].

Katakofsky agreed that the Respondent was not responsible for authoring the original complaint report and that it was the document that he received when he was assigned the case. He also acknowledged that [REDACTED] was identified through the investigatory work of the Respondent, specifically, computer checks which led to determining that "[REDACTED]" was actually [REDACTED]. He also stated, in response to the Court's questioning, "I'm not sure what checks were conducted, I know checks were conducted." Katakofsky acknowledged that he contacted MISD to ascertain if the Respondent performed computer checks on [REDACTED] and Focarile, although he was unable to recall what checks were specifically conducted.

Katakofsky agreed that he spoke to McGuire, who stated that he had telephone contact with the Respondent following the incident and that the Respondent requested McGuire to come in to view a photo array. He later determined through computer checks

that the Respondent had prepared a photo array on or about July 26, 2005 containing a photo of [REDACTED] for McGuire to view.

With respect to the 61, which identified the perpetrator as "[REDACTED]," Katakofsky testified that the Respondent determined the true identity of this person to be [REDACTED] and thereafter obtained his picture by way of a license plate "given by the complainant or one of the witnesses." He acknowledged that these were "investigative steps" taken by the Respondent. He learned that McGuire was unable to make a positive identification on the photo array, agreeing that he selected the wrong person.

Further to his investigation, Katakofsky determined that the Respondent attempted to contact the incorrect Focarile number listed on the 61 three times. He agreed that this was a proper investigative step, saying that he would "very much so" do the same as an investigator himself. Katakofsky also spoke with Focarile, indicating that due to incorrect information on the 61, namely, the wrong name of "Focanili," he had a difficult time trying to obtain the correct phone number for him. He acknowledged that the only way that he was able to reach Focarile was because there was a record of him and his information in the IA-Pro⁴ system as being a complainant in a prior IAB case. Katakofsky added that the Respondent had never worked in IAB and would not have had access to the IA-Pro system.

Regarding the telephone records, DX 1, a 911 call appears on Focarile's correct telephone number. Katakofsky admitted that in looking at the document, the date or time was not there and it was not possible to determine if it was an incoming or outgoing call. He agreed that it was probably the case that Focarile was making the call to 911, and not vice versa. He confirmed that the records showed this 911 call and a call between the 45 Precinct and Focarile's correct number. He clarified that he did not request a "dump" of

⁴ IA-Pro is a computer database used by the Internal Affairs Bureau.

the phone records at the 45 Precinct, specifying that "normal circumstances is just running LUDS and tolls," and that a dump would yield incoming and outgoing calls and be cost prohibitive. Katakofsky testified that the purpose of obtaining Focarile's telephone records was to "hopefully find a phone call from Detective Aasheim to Mr. Focarile."

Despite the fact that the phone records were subpoenaed by the Bronx District Attorney's office further to a criminal investigation "involving Mafia," Katakofsky stated that there were no connections between the Respondent and [REDACTED] or any other crime figures. When asked about the telephone call between Focarile and the 45 Precinct, Katakofsky testified that this call was not involving the McGuire assault and could not have been because "the date is long after the closing of the case...according to the DD5s." He acknowledged that he had been informed that these DD5s reflecting the closing of the case on July 19, 2005 were re-creations. Katakofsky stated that while this document stated "recommends closing it, it doesn't say it was closed." Confronted with the fact that McGuire viewed a photo array on or about July 26, 2005, after the recommended closing of the case on the recreated DD5, Katakofsky again stated that "I don't know if it was actually closed" due to the missing original case folder. Katakofsky believed two of the DD5s were re-creations and that the whereabouts of the remaining DD5s are unknown. He was asked:

Q: When you say Mr. Focarile contacted the 45 Precinct on a date after the closing of this case, it's after the date that you think the case was closed according to the recreated DD5s?

A: Correct.

Q: Detective [Katakofsky], again just to be crystal clear, you have made the point several times yesterday, but Detective Aasheim did maintain unequivocally that he did have one phone conversation with this witness, Mr. Focarile about the incident?

A: Correct.

Katakofsky was questioned by the Court. He acknowledged some of the DD5s were re-creations, but that the Respondent appeared at his Official Department Interview with two DD5s of his own. He was unaware if DX 2 was a re-creation or an original. When questioned regarding the call between the 45 Precinct and Focarile appearing in the telephone records, Katakofsky stated, "That is from Focarile to the precinct. I know that specifically because that was one part of the entire case." He subsequently acknowledged that this fact did not appear in any of the records or on the document itself, and that the document lacked dates and times. He could not remember the date from memory but stated that he could "recreate it" from the Verizon disc.

Regarding the phone records, Katakofsky acknowledged that he did not have the records for every number in the 45 Precinct and regarding the records he did have, it was only for outgoing calls. After examining the records, he agreed that the documents show the number 822- [REDACTED] and 822- [REDACTED] both of which are exchanges in the 45 Precinct Detective Squad. He also agreed there are no calls for the number ending in [REDACTED]⁵ In reference to the three calls that were made from the 45 Precinct Detective Squad to the incorrect Focarile number, it was agreed that they came from the exchange ending in [REDACTED]. However, Katakofsky admitted that the phone data, DX 1, does not reflect calls to the incorrect Focarile number from extension [REDACTED]. Thereafter, he agreed that there was the possibility that the records he obtained did not encompass all of the outgoing calls from every exchange in the 45 Precinct.

Katakofsky was asked if he was familiar with what a "trunk line" is. He stated that he heard the term but was not completely familiar with it, offering it is "[s]ort of an

⁵ The Department stipulated on the record that 822- [REDACTED] is an exchange in the 45 Precinct Detective Squad and existed during the summer of 2005.

extension on the lines attached to a main number. He believed the main number to the 45 Precinct to end in 5411 and that calls coming into that number had the ability to “jump” to other extensions. For example:

Q: I can call 5411 right now to speak to T S but I’m going to get somebody—the desk sergeant picking up because the T S is busy at that point in time?

A: Correct.

Asked how this example would affect how telephone LUDS and tolls records would appear, Katakofsky stated, “I’m not sure of how that works.” He opined that it was his understanding that an extension used to make an outgoing call remained constant on phone records. Specifically, “If I’m at 5111, and I dial, it should show 5111, not get bounced to [REDACTED] and show [REDACTED].” He had no explanation for the fact that 28 calls to the Respondent’s wife were shown from the T S operator at the 45 Precinct, and acknowledged that “5411” was the operator’s extension in the building.

Katakofsky never requested LUDS or tolls on Focarile’s home telephone number, nor could he recall what that number was and stated he did not recall requesting it. He believed he conducted a criminal history check on Focarile and stated he was not sure about his New York and Ohio drug convictions, stating he would need to look at the record. He was unaware of the specifics surrounding Focarile’s Ohio arrest for trafficking drugs.

Katakofsky explained that he did question him about his bias with the Department and IAB specifically, noting that he had a relative who was a Deputy Inspector and was terminated from the Department through IAB. This was not noted on the worksheets, and he felt that this made Focarile more credible because “he had somebody related to him fired by internal affairs but yet he was still willing to cooperate with us.” He clarified that he did not question Focarile about his specific background, stating, “[o]nce I found out about his previous history with his family, it seemed that was credible enough.”

During the Respondent's Official Department Interview, Katakofsky admitted that the Respondent told him that he spoke with Focarile during a brief conversation and he said he could not identify the perpetrator. Katakofsky stated, however, that Focarile told him "I believe he did say it was [REDACTED], from a profile it looked like [REDACTED]". He previously expressed to Katakofsky that he knew of [REDACTED] by name and could identify him from a profile. In response to the Court's inquiry, Katakofsky stated that some of his conversations with Focarile were taped and others were not; conversations in person were taped.

Katakofsky was further cross examined with respect to his discussions with Focarile. He acknowledged, again, that Focarile told him he knew of [REDACTED] and recognized him at the scene of the assault. He could not recall if he ever showed a photo array containing a photo of [REDACTED] to Focarile. When [REDACTED] was shot and killed by members of the State Police, Katakofsky recalled Focarile remarking that he saw "[REDACTED] in the papers." Though he may not have stated it in the manner exactly quoted, he understood Focarile to be referring to someone that he had a familiarity with. All of the conversations with McGuire and Focarile occurred after [REDACTED] was shot and killed, and after his name and picture had appeared on the front page of the newspapers.

Regarding the Official Department Interview of the Respondent, Katakofsky acknowledged that the Respondent stated that he spoke with Focarile briefly and he claimed that he could not identify the perpetrator. When counsel for the Respondent asked Katakofsky if he tried to get the Respondent to change his statement about speaking with Focarile, he stated, "I gave him an opportunity to change his statement, correct." He played a tape, on the record, of a phone call between Focarile whereby Focarile stated he never spoke with anyone. The Respondent was then informed about the consequences of false

statements. The Respondent reiterated that he did have a phone conversation with Focarile where he stated he could not identify the perpetrator.

Katakofsky agreed that he placed a controlled phone call to the Respondent. During this call, he represented himself as McGuire and called to find out the status of the case. He agreed that the Respondent informed him that the case was closed and that an arrest could not be made because of a misidentification. Further, Katakofsky acknowledged that during this call, the Respondent stated that he spoke with the witness (Focarile) and the witness claimed that he did not see the entire incident and could not make an arrest.

Katakofsky admitted that the Respondent has always maintained that he called Focarile and that he stated he could not identify the perpetrator. He also agreed that in an instance where the complainant has misidentified the perpetrator and where a witness can not make an identification, there is no probable cause to make an arrest.

With respect to the specification charging the Respondent with impeding the investigation, Katakofsky agreed that he was the investigator for the investigation into the instant case but stated, "I don't make all the decisions." He was not of the belief that the Respondent impeded or prevented him from properly investigating his case or any other case.

During the course of his investigation, Katakofsky agreed that he investigated more than ten members of the service, examined half a million phone records, and amassed five boxes of records. The investigation started prior to the homicide of Police Officer Daniel Enchantegui, commencing with a tip from Bronx Narcotics where an individual involved in a drug transaction claimed that he knew a police officer who could obtain license plate information about a vehicle that was believed to be conducting surveillance of a narcotics operation. When questioned about this tip, Katakofsky stated that he determined that the

license plate of a Bronx Narcotics vehicle was queried using a mobile digital terminal computer by a member of the service. He acknowledged that this inquiry was not made by the Respondent or anyone else from the 45 Precinct and that the officer whose code was utilized to access the information was alone and performing a mail run. The officer subsequently denied doing the mail run or performing the check. This allegation was closed as unsubstantiated and the officer was never the subject of charges and specifications.

Katakofsky was asked what the difference was in the Respondent failing to safeguard his computer code and the MDT code involved in the license plate check of the Bronx Narcotics vehicle. Specifically, he was asked why charges were preferred against the Respondent and not the other officer. Katakofsky stated, "Like I said, I don't make all the decisions in the case."

With respect to Francese, Katakofsky agreed that he was a subject and acknowledged that Francese's daughter was the subject of a computer check via the Respondent's computer code further to her being arrested. Computer checks were also conducted of Francese's daughter by Francese himself, "along with other people." The complaining victim in Francese's daughter's arrest was also queried via computer. Katakofsky did not recall how many times Francese's daughter was subject to a computer check, but recalled Francese being the subject of, and pleading guilty to charges and specifications for the checks. During an Official Department Interview of Francese by Katakofsky, it was discovered that Francese possessed the computer code of another detective in the Detective Squad. It was not known if Francese was working during the same time period that the Respondent's computer code was used to make computer inquiries. There was no indication that the Respondent knew Francese's daughter. Katakofsky also admitted that during his investigation, he was looking at contacts of Francese's. Specifically, it was discovered that [REDACTED] was selling drugs to

██████████ who had several phone conversations with Francese before and after the McGuire assault case. Francese also performed computer checks of ██████████ and possibly ██████████, and also generated a photo array including ██████████ in September of 2005.

Katakofsky clarified that in assembling a photo array, you can input a person's name to locate the picture. He was unsure of why Francese created this photo array and admitted that he found it peculiar.

Katakofsky was not sure of what Francese's connection was with organized crime members but stated he knew the connection with ██████████. He indicated that there were no connections between the Respondent and ██████████, ██████████, or ██████████. He admitted that he was unable to identify any reason in his investigation as to why the Respondent would "throw" the McGuire assault investigation.

On re-direct examination, Katakofsky did not recall the number of times he spoke with Focarile but indicated that it was more than once. He testified that during every call with him, he asked Focarile if he had spoken with the Respondent and he replied that he had never spoken with anyone. Regarding his investigation, he stated that he first spoke to McGuire and then Focarile. McGuire "had no information...I don't believe he had a name." Regarding the recreated DD5s, the Respondent told Katakofsky they were re-creations but stated that it was an accurate representation of the "sum and substance [of] his conversation with Mr. Focarile."

When he spoke with McGuire, Katakofsky testified that he thought that the case was still open and that he was trying to get in contact with the Respondent. He explained that subsequent to his call to McGuire, he placed the controlled call to the Respondent purporting to be McGuire checking on the status of the case. At the Official Department Interview of

the Respondent, the Respondent stated that McGuire had called him asking about the status of the case.

Katakofsky also testified that LUDS and tolls were requested for Focarile's cellular phone number "hoping there was a call placed to Mr. Focarile between Mr. Focarile and [the Respondent]." There was no contact between the two observed in records of the Respondent's home and cellular numbers.

During further re-cross examination, Katakofsky stated that his investigation of the McGuire/Focarile case began in December 2005-January 2006, after [REDACTED] had been killed. When he telephoned the Respondent pretending to be McGuire, the Respondent said that the case was closed due to an inability to identify the perpetrator.

Upon inquiry by the Court, Katakofsky stated that the controlled phone call to the Respondent was on March 24, 2006. He acknowledged that when he tried to reach the Respondent he had some difficulty, noting "It took a few times for us, for me, us, the bureau to get through to him...It's usually difficult to reach a detective in the [s]quad." The Court asked, "In other words, there was nothing abnormal about having to make several phone calls to reach him?" to which Katakofsky replied, "No." He stated that McGuire had expressed that he was having difficulty reaching the Respondent as well, stating that he had left several unreturned messages. Regarding the license plate of the Bronx Narcotics vehicle that was queried, Katakofsky stated that it was on or about November 23, 2005, and that [REDACTED] was killed in the first half of December of 2005. Further, he stated that it was around the same time of [REDACTED]'s death that he learned that the investigative file for McGuire's complaint had gone missing. He stated that he was unsure if this was an unusual occurrence and acknowledged that he "briefly" conducted an investigation regarding it.

The Court asked Katakofsky about the recreated DD5s. He indicated he did not know who recreated the documents, but explained how. He stated, "Detective Aasheim has a work station, he has a word processor, not a computer, but the old fashioned word processor, and somebody from the command—two lieutenants, Lieutenant Sharkey and Gonzalez from my command, went over to the 45 Precinct in the squad and there was a disc, one of the discs from detective Aasheim was put into the word processor and the DD5 was created from the disc." Katakofsky elaborated that the two DD5s that Aasheim brought to his Official Department Interview were "two copies I didn't have." Katakofsky also admitted to interviewing Mrs. McGuire and he stated that "she identified what she believed to be [REDACTED] or to her would be the assailant in the case." He could not recall the date that Mrs. McGuire said she went to the precinct to see the photo array.

During further re-cross examination, Katakofsky indicated the conversation with Mrs. McGuire took place after [REDACTED] had been killed and after his picture had appeared on the front page of the newspaper. He stated that Mrs. McGuire said she saw [REDACTED] "punch her husband." He was unsure if she actually saw the punch or how many punches there were. Although the complaining victim could not identify [REDACTED] Katakofsky stated that he "would have had to assume that [REDACTED] was the assailant." Regarding the recreated DD5s, Katakofsky stated that the actual DD5s were not contained on the diskettes. He was not present in the 45 Precinct Detective Squad when the records were obtained.

Regarding the missing case folder, Katakofsky stated that a subject was named regarding this, but that a separate log number was not generated. Neither Detectives Kujan, Ramos nor the Respondent were called to IAB regarding the missing file.

On continued direct-examination, Katakofsky testified that in comparing the two DD5s furnished by the Respondent with the documents that Katakofsky possessed, he stated that there were no differences in them. He explained, "It was the same closing, unable to identify, C 2." He was unsure if Focarile had been shown a photo array with [REDACTED] s picture, but that the DD5s that he had did not indicate that he was.

Summary of Respondent's Official Department Interview

The Respondent was interviewed by Katakofsky and Captain Shea of Group 22 of the Internal Affairs Bureau pursuant to Patrol Guide procedure 206-13, on May 4, 2006. Prior to commencing with the interview, Patrol Guide procedures 203-08 and 206-13 were read into the record and the Respondent indicated that understood them.

The Respondent stated that he has never used a department computer for his own benefit, has never used a department computer to obtain information not pertaining to a case investigation, and has never run information for another officer. He also indicated that he has never made computer inquiries for other officers regarding non case related matters.

He acknowledged having been assigned the McGuire case involving [REDACTED] as a suspect. He was asked about what he recalled regarding the case, and stated:

Ah, it started, I received a complaint report for an assault um from Mr. McGuire. I interviewed Mr. McGuire regarding the assault...I interviewed the complainant. I took the information he had. And he said basically ah he was driving, he was assaulted by a person named [REDACTED] provided us with a plate number. I ran the plate number, ah the plate number came back to a different person. From the plate number I did a check on the last name with a little bit different spelling. Came up with a name of [REDACTED] I placed [REDACTED] into a photo array, I showed the photo array to the complainant, the complainant made a misidentification. I explained to him an arrest would be made if the witness...unable to get in touch with was able to tell me he saw [REDACTED] strike him. I was able to contact the witness. I spoke to the witness and he

told me that he didn't see [REDACTED] strike the complainant. I closed the case out as a misidentification.

The Respondent was asked by Katakofsky if his case folder went missing after he closed the case and he replied that it did. He indicated that Detective Francese did not assist him in this investigation and that he was not part of any investigation with Francese where a photo array of [REDACTED] would have been needed. He did not remember asking Francese to run [REDACTED] s name for a photo array.

The Respondent stated that he has been a detective for four years, and was a police officer prior to being promoted. He was never designated as a police officer special assignment. He stated that as a police officer, he worked in an investigative capacity in the detective squad and has handled thousands of cases in his time as a police officer in the squad to the point when he was promoted to detective. He indicated that his present case load is "maybe 15 cases" and that the most cases he has ever carried at any time was "somewhere around 20 to 25."

The Respondent has handled murder investigations, and been the lead detective in murder investigations. He has investigated robberies, assaults, burglaries and "anywhere from aggravated harassment to a murder." When he was asked what type of case was most prevalent in his career, he stated robberies "because I was assigned to the RAM⁶ unit for maybe three and a half years."

Katakofsky questioned the Respondent regarding the missing case folder. He stated, "I was ah, called at home by my sergeant, my commanding officer, asked to come into work. Ah when I came into work he showed me the complaint report, asked me if I knew about it.

⁶ Robbery Apprehension Module

Ah I went back to my records um showed him what I had of the case, explained the case to him and he told me that he would take care of the case from there."

He indicated that Detective Francese was not arrested on December 19, 2004.

The Respondent admitted to having one cellular phone which belongs to the East Norwich Fire Company where he has been a member for 20 years and presently holds the rank of First Assistant Chief. He has a take home car which he is able to drive into work every day. He was promoted to the rank of Detective "sometime" in 2000.

Regarding the [REDACTED] case, the Respondent stated that he prepared "maybe four" DD5s and spoke to the complainant, McGuire, three to four times. He was asked about Focarile's involvement and inability to make an identification. He stated that he called Focarile on the telephone and relayed his conversation as follows:

I spoke to him, I spoke to him over the telephone and what he explained to me over the telephone that he was probably like the third car back, cause he was on a private street, he stopped in a line of cars to see what was happening, walked up to the first car and there was a man (inaudible) who was bloody and he gave his name, you know if you need anything give me a call and that's how he came upon his name. You know he told me that he didn't see any of the assault but everybody around was like oh, [REDACTED] did it [REDACTED] did it.

He explained that he was first unable to contact Focarile because the number on the complaint report was incorrect. When McGuire came in for the photo array and made a misidentification, the Respondent told him that he needed to speak to the witness but was having difficulty doing so. McGuire then "said I have the witness' number here in my wallet, and when we looked at the um the number in his wallet that he had written down, was different from that on the 61." The Respondent stated he used this new number to contact Focarile. When asked what the new number was, he said, "I think there was just two of the last couple of numbers might have been inverted."

During the interview, Katakofsky stated that he had two DD5s, one documenting the Respondent's attempt to contact the witness and the complainant's inability to participate in an identification due to a swollen eye, and the second reflecting that the Respondent reached the witness and said he did not see the incident. The Respondent provided copies of what he "had left on the disk" at the interview.

The Respondent stated that Mrs. McGuire was riding as a passenger in McGuire's vehicle and that he spoke to her and she was not able to identify anybody. He said that he did not show her a photo array, explaining that: "what happened was when I showed Mr. McGuire a photo array um he asked me if he could see who the person was that assaulted him. I showed him who it was and I was standing there face to face when he turned and he told his wife this is the guy who hit me. She came up and said I'll swear in a court of law that this is the guy that struck my husband..." The Respondent clarified that the photo array was shown to McGuire with Mrs. McGuire sitting on a bench behind him. They were informed that an arrest would not be made under these circumstances, that this was an improper identification.

Regarding how the picture of [REDACTED] was obtained, and how the Respondent arrived at his name, he stated that he performed a check of a license plate provided by McGuire. The plate came back to [REDACTED] and from there he was able to locate a [REDACTED] with a NYSID⁷ number and an arrest history.

The Respondent was questioned again regarding his communication with the witness, Focarile. He stated that further to receiving the different number from McGuire, he called Focarile from the 45 Precinct Detective Squad. He said the call could have been made from

⁷ New York State Identification Number—a unique identifier assigned to an individual by the New York State Division of Criminal Justice Services.

“one of four or five” telephone numbers in the detective squad. As he previously said, Focarile told him he did not see anything and could not make an identification. Regarding a DD5 in Katakofsky’s possession at the interview, dated July 19, 2005, documenting this conversation, the Respondent indicated that he did not recall preparing this document. He did agree, however, that it reflected his conversation with Focarile.

The Respondent admitted to conducting computer checks on the original spelling of Focarile’s name, as listed incorrectly in the complaint report. He stated that he tried to find an address using a driver’s license check or arrest history and “nothing came up.” As he previously explained, the Respondent reached him when McGuire provided the correct number.

Regarding Detective Francese’s daughter, the Respondent acknowledged being aware that she had been arrested on December 19, 2004. He also acknowledged that on that day, he was working from 4:00 pm to 1:00 am. When Katakofsky asked him why he made an inquiry of the name “Francese” in the BADS system, he stated, “Why would I do that? No I wouldn’t do that.” He had no knowledge of his BADS code being used to access information relating to Francese’s daughter’s arrest. The Respondent stated that Francese did not call him to ask him to perform a computer inquiry of his daughter. He was unsure of the night she was arrested, and stated that he learned of the arrest when Francese came to work.

The Respondent stated that he did not make any false statements during his Official Department Interview. He stated that he talked to Focarile on one occasion and that he received his correct number from McGuire at the showing of the photo array to him which was after July 6, 2005. He was unable to cite the specific date due to not having his original case file. Katakofsky then informed the Respondent that the phone records for the 45

Precinct had been subpoenaed and that no calls to Focarile's correct number, 917-939-0427 had been reflected in the records. Confronted with the fact that a DD5 states that contact had been made to Focarile on his correct number from a squad phone, the Respondent did not have any explanation as to why it was not reflected in the phone records. Katakofsky informed the Respondent that the records showed three calls to [REDACTED] the incorrect number, and the Respondent stated that those calls represented attempts by him to call Focarile.

Katakofsky asked the Respondent "Was there a reason why he himself [Focarile] on the 61 mentioned, on the 61 mentioned [REDACTED] as the suspect?" The Respondent replied that he did not speak to Focarile at the scene and did not ask this when he telephoned him. Captain Shea asked the Respondent if he was positive he phoned Focarile from the 45 Precinct squad and the Respondent said "yes." Katakofsky then played a recording of a phone conversation into the record, as follows:

Male Voice (Focarile): Not a word to me about anything about this whole this.

Male Voice (Katakofsky): (inaudible) no (inaudible).

Male Voice (Focarile): Nothing, nothing, no cop, no contact (inaudible) grandmother got my number (inaudible).

Male Voice (Katakofsky): Alright fine.

Male Voice (Focarile): And (inaudible).

Katakofsky explained that Focarile was going to sign an affidavit stating he was never spoken to regarding the case. When asked if he provided a false statement during this Official Department Interview, the Respondent stated that he had not.

When the Respondent showed McGuire the photo array, he said that his wife "was seated behind him on a bench, like on a seat." Katakofsky stated that "Phyllis McGuire (McGuire's wife)...stated during an interview that she was shown a separate photo array in a separate room and positively identified [REDACTED] with no coaching or no help." To that, the Respondent stated, "Absolutely not by me, absolutely not." He explained that Mrs. McGuire

was shown [REDACTED]'s photo by her husband and she proceeded to remark that she would "swear in a court of law" that [REDACTED] was the perpetrator. She was not shown the photo array in a separate room. The Respondent said that he told them that this was an inappropriate identification.

The Respondent stated that he was unaware of any other members of the service showing Mrs. McGuire a photo array in a separate room. He said that he did not purposefully taint this investigation and has never encountered or known [REDACTED] before. The Respondent stated that he had been to [REDACTED]'s house once during his investigation and left his business card requesting a return phone call. [REDACTED]'s attorney subsequently called the Respondent to inform him that [REDACTED] was represented by an attorney. He did not take out an "I-Card" or apply for a warrant for [REDACTED].

The Respondent said that he has never been in the military, nor does he have any time that he can "buy back" from the City in order to retire early. He said that he does not have a steady partner, but has a team that he works with. The Respondent stated that he was never a cadet or a member of the Transit Police Department prior to the merge. He has been in the 45 Precinct Detective Squad for five years—four as a detective and one as a police officer. He said that the information that he received regarding Francese's daughter's arrest was "just what in conversation what Neil [Francese] would tell us about it." The Respondent had no explanation for why Francese's daughter's name was queried using his BADS code, and stated that he did not provide his code to anyone.

With respect to the missing case file, the Respondent said, "People were saying that somebody in the precinct that you know took the case and you know threw it out." There was no reason provided and no names were "thrown around" as to who might be responsible for its disappearance. The Respondent said that he does not spend any personal time in the

Bronx, does not "hang out" in the Bronx and does not go drinking after work. He could not explain why Focarile's cellular phone records did not show any incoming or outgoing calls from the 45 Precinct. He did not know Focarile in the past and that he "spoke to him once and that was it."

Captain Shea asked the Respondent if there was an explanation of why Focarile would say that the two never spoke. The Respondent's attorney stated, "I can see a million reasons why he would say oh, I didn't see anything, I didn't see anything that night...Mr. [REDACTED] is [now] dead and say all of a sudden well no, you know I did see something...Detectives never contacted me." Katakofsky stated that [REDACTED] has been Focarile's telephone number since the June 30, 2005 incident and that he has never had another number. Asked to explain why the records did not show Katakofsky receiving a call, the Respondent stated, "I'm telling you I contacted him on his cell phone. I spoke to him and that's how I closed the case out..."

McGuire was never contacted by the Respondent to advise him that the case had been closed. The Respondent stated, "Well he contact me ah matter of fact about two weeks ago and he had called me at the precinct...he said you know he said that I made a positive identification on a photo array, I want to know why a arrest hasn't been made...I explained to him you did not make a positive identification...the perp that you said did this has, was killed by the police, the case is closed..." He clarified that before [REDACTED] was killed, he never contacted McGuire to tell him the case was closed. He was asked if this was normal practice and he stated that he had informed McGuire at the photo array that an arrest would not be made unless Focarile could make an identification.

The Respondent stated that he does not know [REDACTED] [REDACTED] or [REDACTED]

[REDACTED] He was not involved in the FBI's investigation into [REDACTED] and they never

contacted him. He had no idea why his computer code had been used to access the details of Francese's daughter's arrest, and stated that he did not assist Francese in finding the identity of the complainant or witnesses in that case. He said that he never contacted the arresting officer or the DA involved in that case. The Respondent did acknowledge working the night of Francese's daughter's arrest—December 19, 2004—and that he was possibly running checks for another case and left his computer unattended. He explained the atmosphere of his office, "A lot of people are in our office...[it's] like an open door unfortunately. Different agencies come in with their arrests... [t]hey'll come in at the computer and when we come back in they're on the computers running arrests, name checks and so forth..." He stated that he was aware of the Department's requirement that you must log off of a computer when leaving the computer.

Katakofsky asked again about the Respondent's contact with Focarile. He reiterated that he did have contact with him over the telephone and that Focarile stated he could not make an identification. The Respondent could not offer an explanation as to why this call was not reflected in Katakofsky's telephone records.

The Respondent's Case

The Respondent called retired Sergeant Robert Jones, retired Detective Gary Kujan, Lieutenant James Hanvey, and retired Detective Richard Ramos. He also testified in his own behalf. The Respondent offered into evidence a copy of complaint number 4888 from the 45 Precinct, Respondent's Exhibit (RX) A; a copy of LUDS and tolls, RX B; and a packet containing two original DD5s, two photo arrays, and a handwritten note, RX C.

Retired Sergeant Robert Jones

Jones is presently employed by AIG Insurance as a claims investigator. He is a retired sergeant from this Department.

Jones stated that he retired from the Department on June 30, 2005, and was so employed from 1985 to 2005. Further, he was the former commanding officer of the 45 Precinct Detective Squad. Prior to becoming the squad commander, he described himself as "second whip of the squad." He directly supervised the Respondent from 2000 to 2004, in matters such as "proper investigation of his cases, the timely submission of his DD5's, the following of protocol for conducting an investigation, and ensuring that the investigation was conducted from beginning to end in a proper and complete manner." He supervised a "couple hundred" of the Respondent's cases.

Asked to offer his opinion on the Respondent's "thoroughness and professionalism," Jones stated, "I felt Detective Aasheim was an extremely competent investigator. I felt that he learned very quickly in his time in the squad before he got his gold shield...I believe he performed extremely well, he was competent, very level-headed, and very open to listening to criticisms and anything that he needed to get the job done." While the Respondent's supervisor, Jones completed evaluations of him and stated that he "always received very high marks." Jones indicated that there were never any disciplinary matters of "a dramatic importance" concerning the Respondent or anything that would have interfered with an investigation. Jones testified that the general consensus regarding the Respondent's integrity was that it was "beyond reproach." He found him to be a competent detective.

On cross-examination, Jones agreed that his date of retirement from the Department was June 30, 2005, and at that time, he was not part of the 45 Precinct Detective Squad.

He stated that he did not “have the particulars” about the case at bar in this tribunal. He acknowledged that past June 30, 2005, he had no occasion to work with the Respondent and that he had no idea about the outcomes of his cases past retiring in June of 2005.

On re-direct, Jones stated that he would “find it hard to believe” and “extremely difficult to believe” with respect to an allegation that the Respondent would intentionally “throw” or squash an investigation.

Retired Detective Gary Kujan

Kujan is a retired member of the Department, having retired in 2006 at the rank of Detective.

In August of 2005, Kujan was working in the 45 Precinct Detective Squad and the Respondent was a co-worker of his. He testified in the summer of 2005, he “took a lot of time off,” but upon returning in September, he learned that “a case that Tommy had was missing from the 45 Detective Squad.” He was informed of this fact by the Respondent and Sergeant McCormick. He then had a discussion with McCormick and Detective Ramos. He stated, “his feeling on the whole thing was let’s just forget about it, let’s not talk about this case anymore, and he asked Detective Frank McHugh to retype up the DD5’s and put the case back in the folder...I told Detective McHugh don’t get involved, don’t be typing up anybody’s 5’s up. You don’t even know what the case is about, and don’t get involved, Frank. I come to find out later on that Frank did retype the 5’s and put them back in the case folder.”

Kujan further testified, “...I was a delegate there at the squad during that time, and a short time after the discussion about let’s forget about the case, I remember Detective Ramos was working with us, and he got a call from narcotics. Some of his friends were on a wire, and they heard somebody on the wire talking about the stolen case out of the 45.”

Upon bringing this to McCormick's attention, he was not interested, and remarked, "I don't want to talk about [this case] anymore." While Kujan testified that McCormick never acknowledged McHugh recreating the DD5s, he was present when he told McHugh to retype them and put them back in the draw "and forget about it."

On cross-examination, Kujan acknowledged that he knew the missing case was an assault case and was assigned to the Respondent. He was unaware of who the witnesses listed were. He did not work with the Respondent on this case, nor did he hear the Respondent attempt to contact the complainant or the witness in the case. Kujan agreed that he did not know what investigatory steps were taken by the Respondent with this case.

On inquiry from the Court, Kujan stated that he worked in the 45 Precinct Detective Squad for six years, as a detective and also retired in this rank. He stated his date of retirement was January 6, 2006 and retired from the 45 Precinct Detective Squad. He testified that in his time in that command, he was not aware of any other times where an investigative file had gone missing and that was the only instance that he was aware of. He agreed that the missing file should have triggered an investigation and said that he told McCormick, "you can't just retype the 5's and put them back in there, yeah..." He did not call Internal Affairs to report this, and he learned of the investigation into the Respondent between December of 2005 and January of 2006.

Kujan said that he spoke to counsel for the Respondent over the summer of 2008 about his testimony in the instant case. He did not speak to the union about it and stated that the Respondent asked him to appear before this forum and offer testimony. He acknowledged that he had spoken with the Respondent "several times" about the missing file, the last instance being in April of 2008. Additionally, Kujan said it was "all known in

the office” that the file had gone missing when he returned from vacation sometime in September of 2005.

Lieutenant James Hanvey

Hanvey is presently assigned to Detective Borough Bronx and is entering his fifth year of being so assigned. He has been a member of the Department for 15 years.

Hanvey said that he is familiar with the Respondent as he has worked for him since August of 2006. He explained the circumstances in which the Respondent came to be assigned to his command. He stated, “He was placed on modified, I remember it like it was yesterday, when I first walked into the door and I saw him smiling, he was placed on modified. That is what struck me. Usually everybody who is placed on modified they are not happy, they sit there and are really not much help... [the Respondent] in the last two years has probably been the back bone of my unit. He’s very professional.” Hanvey explained the organization of his unit and his duties, explaining “we are like the liaison for the Chief, part of his staff.” He explained that he supervises a sergeant, 12 detectives, and felony apprehension team in addition to handling a database that tracks shootings and homicides in the Bronx.

He commented on the Respondent’s performance, stating, “Tommy is someone that you don’t have to give an order to twice or ask to do something. I don’t order, I ask. And Tommy does reports on a weekly basis for the chief and myself. And you never have to remind him to do so.” He opined that the Respondent is “very professional...Tommy has a great working relationship with the captains, the chief, inspector....” He explained that in the Respondent’s duties, he deals with squad commanders who are under a lot of pressure, and that the Respondent has the “right personality” and that the commanders “have a lot of

respect for him in his experience and he works well with them, too.” Hanvey stated that he rated the Respondent a 4.5 out of a possible 5 on his last yearly performance evaluation. He stated that the Respondent’s reputation in Detective Borough Bronx is that “He is highly thought of. There is no question about his integrity at all in my opinion.” He explained that the Respondent performs background checks of perpetrators, shooters and victims of shootings and has “tremendous” integrity.

On cross-examination, Hanvey stated that he has been in Detective Borough Bronx for four years, and worked for over five years as a sergeant in the 44 Precinct Detective Squad. He further elaborated upon the duties of his unit, stating that they prepare executive staff of the Department for Compstat, maintain databases, generate reports and keep statistics. When asked about his current responsibilities in contrast with those duties in a detective squad, he indicated that while his unit does review cases they do “not for the most part” follow-up with complainants. He indicated that he was not assigned to the 45 Precinct Detective Squad in June of 2005 and that he was not familiar with the Respondent during his time at that command. Hanvey mentioned that when the Respondent was newly assigned to him, a Homicide lieutenant tried to “grab him,” opining that the personnel assigned there had “much more familiarity with detective Aasheim.”

On re-direct examination, Hanvey explained that a lieutenant from Homicide wanted the Respondent to be assigned to him “because of his experience and what he would bring to the Homicide Unit...he’s a good detective.” He testified that the Respondent has access to the COGNOS system in his duties and that only a limited number of individuals have access to this system. Hanvey opined that the Respondent having access to this system demonstrated that he was trustworthy.

Detective Thomas Aasheim

The Respondent has been a member of the Department for 17 years. He is presently assigned to Detective Borough Bronx.

He testified that his assignment to Detective Borough Bronx was subsequent to being placed on modified assignment and that he previously worked in the 45 Precinct Detective Squad for five years as an investigator. He explained that he was first assigned to that command as a police officer in the robbery unit and was thereafter promoted to detective. He stated he was then "elevated from the robbery unit to the detective squad where I would handle any cases as far as aggravated harassment to homicide." The Respondent explained that his duty was to investigate each crime to the fullest of his ability. He has personally investigated "over 1200 cases" in his time at the 45 Precinct.

The Respondent testified that after June 30, 2005, he was assigned to investigate an assault complaint where McGuire was the complaining victim. He received this case on or about July 1, 2005. He explained the process in which a detective receives a case: "What happens is when a crime or some sort of incident happens in the street, uniform police officers respond to that incident. They take a report which generates a UF-61 which is a complaint report. It lists the complainant's information, the crime, what happened. It gets typed up and then gets sent upstairs to the 2nd floor detective squad. If something would happen normally during the day, when you come in later on from the 4 to 12 you would get assigned that case, this way being it just happened that day or the day previously you can get on top of it and start investigating right away." He confirmed that this is what happened with the McGuire complaint, and acknowledged that RX A was the report that he received about the incident. The Respondent stated that there could be 10 to 20 open cases at any given time.

In viewing RX A, the Respondent gathered that McGuire was driving his car and encountered a car that had "abruptly pulled out of the back of the driveway...[t]he male that was driving the car got out of the car, walked up to his vehicle and punched him while he was seated inside of his car. The male then got back into his car and fled the scene."

The document reflected that the perpetrator was [REDACTED] of [REDACTED] [REDACTED] a name that the Respondent later determined was incorrect. It also listed a witness of Anthony Focanile and a telephone number. The Respondent did not know either the perpetrator or the witness prior to June 30, 2005.

The Respondent testified as to the steps that he undertook to further his investigation after he received the complaint report ("UF-61"). He stated that he normally looks to determine information about the complaining victim, such as criminal records, driver's license, and whether the person has a pattern of filing complaints. He "absolutely" did this with regard to McGuire. He stated he next contacts the complainant to interview the person as he explained that the complainant's emotions can sometimes prevent a completely accurate account of the incident. He stated that he did this as well with respect to McGuire, and it was done via telephone from the detective squad. The Respondent testified:

I telephoned him from the detective squad. He explained to me that he had been driving home with his wife in the car. He was proceeding down Rivere Avenue approaching Philip Avenue when a car suddenly backed out, a black SUV backed out of the driveway very quickly. He jammed on his brakes and almost hit his car. Honked his horn a few times at the guy. The guy became agitated, got out of his vehicle, walked up to him and proceeded to punch him on the side of the face. The male got back into his car and fled the scene. He said as a result of him getting punched on the side of the face he received 15 stitches which required medical attention at the local hospital.

During this telephone conversation, the Respondent asked McGuire if he could identify the perpetrator, and McGuire indicated the possibility of doing so. He also provided two possible New York State license plates which he provided to the Respondent which were recorded in the notes. The Respondent told McGuire that he wanted him to come to the precinct to view a photo array, and McGuire said that due to the fact that he had just gotten stitches and that his eye was swollen, he would not be able to come to the precinct for "a couple of days or a week or so." McGuire said that once the swelling had subsided, he would contact him in order to come in.

McGuire did later come to the precinct. Prior to this, the Respondent stated that he proceeded with his investigation. Specifically, he attempted to run the name "[REDACTED]" through several computer databases such as DMV, E-Justice and BADS. All of these searches did not yield any results. A check of one of the two license plates provided by McGuire revealed the name "[REDACTED]". Comparing this name with the name listed on the complaint report, the Respondent performed a computer check of "[REDACTED]" and received a result of a person with an arrest history. One of the arrests had a photo on file with the photo management system. The Respondent testified that he called McGuire again and the two arranged a time on July 26, 2005 for him to come to the precinct and view a photo array.

At this point, the Respondent explained that he "felt comfortable" the perpetrator could have been [REDACTED]. He stated that he went to [REDACTED]'s house and left his business card at the door. He returned a second time and spoke with [REDACTED]'s father, and left his business card again. Later that afternoon, he was contacted by a person who stated that he was an attorney representing [REDACTED] and that any communication should go through the attorney.

The complaint report listed Anthony Focanile as a witness along with a telephone number. The Respondent testified that he “made several telephone calls to the number listed on the complaint report. I was not able to get a hold of anybody. Each time I telephoned the number the telephone would just ring and ring. There was no answering machine, no service or nobody could ever pick up on the other side. There was no home address listed on the 61 for an Anthony Focanile.” He explained that he conducted computer checks in the name of Anthony Focanile with no results. With respect to the three telephone calls to this “wrong number” reflected in the telephone records and Katakofsky’s testimony, the Respondent indicated it was he who made these calls. The Respondent stated that he was not familiar with the IA-Pro system and likewise can not access that system or any Internal Affairs Bureau logs or information.

On July 26, 2005, McGuire arrived at the 45 Precinct Detective Squad with his wife to view a photo array. The Respondent prepared a series of six photographs in order to show them. He stated, “They walk in the front door, I introduce myself. I explain to him I will show him a photo, 6 photos. And the person [REDACTED] is somewhere within there. At this time his wife sat down right behind him.” He showed McGuire the photo array and explained that he was having difficulty making an identification. He told him to try his best, explaining that if “you recognize anybody by the slightest it may be the person.” McGuire pointed to a photograph which was not [REDACTED]. The Respondent told him that the photograph he selected was not [REDACTED], and after McGuire failed to make the identification, he stated, “I’m a New York State court officer, can you help me out as far as—show me who might have been the guy who hit [me].” Given McGuire’s occupation, as a courtesy, the Respondent showed him the photograph of [REDACTED]. McGuire then “turned to his wife who was seated behind him. He said: This is the guy who hit me. Now she stood

up, walked over and pointed to the pick and she said: I'll swear in a court of law that he struck my husband." The Respondent explained that he would not make an arrest based upon this, as it was an improper identification.

The Respondent testified that he continued to speak to McGuire, explaining that the only way he could make an arrest was if the witness listed on the complaint report could make an identification. However, he told McGuire that he was having trouble contacting this witness because no one answers his telephone number listed on the report—it "constantly rings and rings and rings." At this point, McGuire told the Respondent that he had the witnesses' information in his possession and he "pulls out of his pocket his wallet and a piece of paper that is scratched with the name Anthony with a telephone number." In comparing this number to the number listed on the complaint report, the Respondent determined that the last part of the telephone number was different. McGuire and his wife then left the precinct, and the Respondent opined that McGuire "wasn't too happy...because I think he felt he wanted an arrest to be made."

Using the telephone number that McGuire provided him with, the Respondent testified that he called the number and a male answered. He identified himself and his purpose for calling. He stated that the male told him, "I was probably about 3 car lengths back, I stopped in traffic because I couldn't proceed any further. I walked up to where the cars were all stopped, there was a commotion going on, I saw a male holding his eye who was bloody, I told him: Are you okay. The guy said: Somebody just hit me, this guy just hit me. There was a lot of people out in the street, everybody is yelling: [REDACTED] did it, [REDACTED] did it." The person stated that he gave McGuire his number and name and then went back to his car and left. The Respondent asked the person if he could identify the perpetrator and he

said "no. He said because he had walked up onto it after it happened, and saw a male holding his eye there." The person then hung up.

The Respondent explained that at this point, there was no probable cause to make an arrest and the case was subsequently closed for unable to make an identification. He speculated that the case could have been closed sometime in August. The Respondent testified that when he conducts an investigation, it is his practice to make "scratch notes" relating to interviews, telephone numbers, dates and times on the rear of the 61. From there, he types up "DD5s, which are the pink 5s with the case investigation based on the notes that I have on the back of the 61." He said that he would have followed this process for the McGuire investigation, and at the completion, put the paperwork in the supervisor's room for review and filing. After closing the case and placing the case folder in the supervisor's box, the Respondent never saw it ever again. He stated that he has no idea what happened to it.

With respect to DX 2, the Respondent reviewed this DD5 which had been provided to IAB. He testified that he did not prepare this document and that the signature appearing on the document was not his. He saw this DD5 for the first time when he went to the basement of the 45 Precinct and found "two DD5s, a photo array and there was another photo of [REDACTED] and some scratch notes at the back of it." These documents were not in its case folder or any other folder. The Respondent stated that when he went into storage, he did not find any of his original notes or DD5s that he had prepared. He stated that he retained what he had found in storage and later provided them to his attorney. Regarding the other items that he found in storage, the Respondent stated that the scratch notes on the loose leaf paper were not his, and he believed the handwriting to be Sergeant McCormick's.

After he closed the case, the Respondent acknowledged that he was contacted by members of Internal Affairs in order to be interviewed. He stated that it was after the interview conducted by Katakofsky that he went into storage to retrieve the documents comprising RX C. The Respondent acknowledged being familiar with retired Detective Neil Francese and was aware that he had a daughter, [REDACTED]. He testified that he learned one day from Francese that his daughter had been arrested in Manhattan for assault. He stated that he did not perform any computer checks of her name or give Francese his computer access code to run checks, and was never aware that Francese had used his code to run checks relating to his daughter's arrest.

On cross-examination, the Respondent acknowledged working at the 45 Precinct Detective Squad for five years and that he had investigated over 1200 cases in that time. He said that the personnel ranged from 28 detectives when he arrived, to 12 upon his departure from the squad. While the Respondent agreed that he and his command had a busy case load, an assault case is something that would have been investigated. He testified that the most serious cases, such as homicides or shootings receive priority in being investigated first. He had no independent recollection about having any more serious open cases at the time that he was investigating the McGuire case.

The Respondent agreed that he contacted McGuire upon being assigned his case and acknowledged that he told him that his wife was present at the time of the incident. He testified, however, that Mrs. McGuire did not witness the incident "because when I interviewed Mr. McGuire regarding the assault, he indicated his wife was with him and that she couldn't identify anything as far as the assault." He admitted that he did not ask Mrs. McGuire herself if she could make an identification, and stated that he did not show her a photo array. He relied upon McGuire's statement that his wife could not identify anyone.

The Respondent admitted to speaking with McGuire on July 1, 2005, and McGuire told him about having to get stitches at [REDACTED]. He also relayed the circumstances surrounding the incident to the Respondent. When shown RX C, with respect to the DD5 dated July 1, 2005, the Respondent acknowledged that while the signature was not his the content was contemporaneous with his testimony regarding the telephone conversation with McGuire. Regarding the DD5 in evidence as DX 2, the Respondent testified that without looking at his original case folder, he would be unable to determine if the date reflected on this document was accurate, however, the content was "in sum and substance" reflected in it.

The Respondent testified that he did not ask Focarile to view a photo array because he determined that there "would be no reason to" based on Focarile telling him on the telephone that he could not make an identification. He agreed that he also made the same determination with respect to Mrs. McGuire. He thereafter closed the case out as "C2," explaining that it means unable to identify. He explained that he does not remember the specific date that he did this, "but it would be some time after I showed Mr. McGuire the photo array, and then after I showed him the photo array some time after that I spoke to Mr. Focarile on the telephone and within a day or two of that I would close it out..." He believed it was sometime in July or August of 2005 that this happened. After McGuire failed to make a positive identification when shown the photo array, the Respondent did not call him to update him on the case because he had explained that an arrest would only be made if the witness, Focarile could make an identification.

During his Official Department Interview, the Respondent acknowledged that he was questioned about FINEST checks being performed using his computer code. He testified, "It's very open as far as officers coming in, sitting down and running the computer that was on your desk." He was aware that a computer check was done on [REDACTED] using his

FINEST code, but “absolutely” denied performing this check, agreeing that it was possible that he could have walked away from his terminal while he was still logged in. He acknowledged that he failed to log off of his computer.

The Respondent was questioned by the Court. He explained the process by which a DD5 is processed. “After you put the case into the sergeant’s room, he’ll sign off on it, read through it, approve it, make sure all investigative steps he feels necessary were done. He will then sign off of it as it is done and then he will give it to the PAA, she will break the records down. What will happen is I will take one copy, it gets sent downtown here to be put into the archives of One Police Plaza. Another one will be put into the case folders in the precinct. Another one is put downstairs in the archives in the basement of the precinct...” In viewing RX C, he agreed that none of the DD5s had been broken down. The photo array included in RX C was not the photo array used by the Respondent to show McGuire, as he was able to recreate the array that he used via the software program that maintains photo arrays. He also stated that the handwritten notes attached to the rear of RX C were not his.

Regarding the DD5s, the Respondent explained that they get broken down at the conclusion of the case and that the supervisor periodically reviews the DD5s. He acknowledged that the copy of the DD5 which goes to Headquarters is not forwarded until the case is closed. In reviewing the two DD5s which Katakofsky testified were the Respondent’s, the Respondent indicated that they were not his and that he did not know who prepared them. He stated that he brought a DD5 to his Official Department Interview that IAB did not have in their file, and they made a photocopy of it. The Respondent explained that the DD5 which he brought was his re-creation based on his own records.

On continued questioning from the Court, the Respondent was asked to examine RX C, which reflected that he spoke to Focarile on July 19, 2005, and that McGuire viewed the

photo array on July 26, 2005. He stated that it was not possible that he interviewed Focarile before McGuire came in on July 26, because it was McGuire who provided him with the correct contact information for Focarile. The Respondent clarified that he was disputing the DD5 relating to the telephone call with Focarile to the extent of the date and the fact that it was not his signature.

During re-direct examination, the Respondent explained that members of the 45 Precinct Detective Unit purchased word processors to replace the typewriters that previously existed. He stated that the word processor differed from a typewriter in that you could store information on a square disc and refer to it at a later time. He stated that he prepared DD5s in the McGuire case on these word processors and that he still possessed the disc containing the data for the DD5s relating to the McGuire case.

Retired Detective Richard Ramos

Ramos is a retired member of the Department. He is presently employed by Met Life Insurance where he works in the investigative department.

Ramos testified that in July of 2000, he was assigned as a detective in the 45 Precinct Detective Squad and remained so assigned for six and a half years. The Respondent was a co-worker of his for the entirety of his assignment at the 45 Precinct. Ramos said that he learned of a problem with one of the Respondent's cases "Sometime during the summer of 2005." Specifically, Ramos stated, "Our Commanding Officer, Sergeant Peter McCormick, had asked me to locate a missing case. I believe something involving a road rage case....assault case that had been assigned to Detective Aasheim." Ramos explained that an investigator from the Westchester County District Attorney's office named John Pegram had contacted the 45 squad looking for information regarding the case. McGuire, the victim, was employed as a court officer assigned to Westchester County.

On the day that he was asked about the case folder by McCormick, Ramos said that the Respondent was not at work. He had never discussed this case previously with the Respondent. Ramos stated, "He [McCormick] was having trouble locating the case and asked me if I would go look for it...I was unable to locate the case. I could not find it." He determined that the case had been closed and he went to the folder where the cases were stored, and "the case folder itself was missing." He then "proceeded to the 494 computer to find the case, make sure it wasn't mis-numbered or misplaced and I could not locate the case in the 494 computer." At the inquiry of the Court, Ramos clarified that he looked for the case folder in a regular metal file cabinet and also checked the 494 computer, which "basically has a listing of all of the cases, detective assigned and the disposition of a case."

Ramos' search of the 494 computer did not produce any result. He was unable to locate the case. He explained, "To me, it looked like it was deleted. The case number was missing. It was out of numerical sequence. The case actually was missing." When he informed McCormick of this, McCormick told him that it was an "administrative error and that we needed to correct it." Ramos said that he then reentered the case in the 494 computer while Detective McHugh re-typed the case. Specifically, he said McHugh used the Respondent's notes and "just typed the case out, the complainant's name, basically recapping what was printed on the complaint report, and I believe he closed the case out with the disposition and put it back in the file cabinet." Ramos stated that McHugh used the complaint report and the Respondent's notes to re-create DD5s for the case file. He did not remember if McHugh spoke with the Respondent prior to doing the re-creation.

Upon being told by McCormick to re-create the case file, Ramos did not make any notifications to Detective Borough Bronx or Internal Affairs. He explained, "Due to the fact that our Commanding Officer, Sergeant McCormick, was aware of the situation, I felt there

was no reason to make a notification.” Ramos indicated that some months later, the issue regarding the case folder arose again. At this point, he said, Internal Affairs had been notified and he believed the Respondent had been interviewed by them. When he learned that Internal Affairs had interviewed the Respondent, Ramos spoke to McCormick who stated that he had informed Captain Dowling, their commanding officer of the situation.

Ramos was never requested to appear at the Chief of Detective’s Investigations Unit, Detective Borough Bronx or any other unit for questioning regarding the missing case folder. He subsequently retired from the Department on January 31, 2007. After the Respondent had been interviewed by Internal Affairs, the issue regarding the missing case folder came up “a month or so, two months later” again. After this, Ramos was contacted by the Respondent’s attorney regarding the subject.

On cross-examination, Ramos acknowledged being a member of the 45 Precinct Detective Squad for approximately six and a half years and performing duties similar to those of the Respondent’s. He agreed that he was familiar with investigatory procedures, and where case folders were stored for the 45 Precinct. Ramos was asked if he had ever heard of case files being lost by the detective squad. He replied, “Yes...It wasn’t many. We handled on average over 3,000 cases a year. If one or two were misplaced, it was probably a lot.” He added that if a missing case file was re-created in those instances, it would be done by the investigating detective.

Ramos testified that he recalled McCormick asking him to find the case folder “sometime during the summer of 2005.” As for the room in which the case folders were stored, Ramos described it as a “small room. It’s basically we use it for a couple of computer terminals there against the wall, and on one wall there is just basically a wall for file cabinets.” He acknowledged that he was unsuccessful in finding the case folder in the

file cabinet and that it was also missing from the computer. He testified that when he inputted the case back into the computer, he re-entered the complaint report number, the case number, the detective assigned and the classification. Because he was unaware of what the disposition of the case was, Ramos left it blank.

Ramos agreed that he found out that McHugh re-created the DD5. He stated that he had never seen either the re-created or the original DD5. He also agreed that he had no knowledge of what the content of the re-created or the original DD5 was and that he did not know if the two documents were one in the same.

Upon inquiry from the Court, Ramos stated that the 494 computer was an index of cases. He was asked if he has ever seen a case folder go missing and be deleted out of the 494 computer, to which he replied, "Never." He has also never seen any other case deleted out of the 494 computer and agreed that such an occurrence is unusual.

FINDINGS AND ANALYSIS

While it is not charged as such, at its core, what this case is about is whether the Respondent improperly closed an assault investigation against a person with connections to organized crime. That is in reality what was litigated before this Court and indeed even the Assistant Department Advocate, in her closing argument, urged the Court to "look at the whole picture." -

While there is not one specification addressing it, there was testimony that the Respondent disregarded an identification made by Mrs. McGuire of her husband's assailant. There are specifications that allege that Respondent claimed to have spoken to a witness, Focarile, but never did so and lied about it on a DD5 and at his Official

Department Interview. While these two issues are the subject of factual disputes there is no question that Respondent's original investigative file went missing shortly after the case was closed, which is, in itself, an issue of concern that affects this case.

The Respondent has argued that there is ample evidence to show that he handled the investigation properly. There is no question that the name of the suspect was not properly spelled in the original police report which indicated he was "[REDACTED]". There is no question that the Respondent engaged in proper investigative activities to identify one [REDACTED] as the suspect. There is no question that the name of the alleged eye witness, Focarile, was also misspelled as "Focanile" in the police report and that the telephone number listed for him was incorrect. There is no question that the Respondent made at least three attempts to reach Focarile using the wrong number provided in the police report. There is also no question that the Respondent conducted a series of computer searches to locate Focarile as well.

There is no question that the Respondent created a photo array using an arrest photograph of [REDACTED] and that he brought McGuire, the victim, in to see it.

The Respondent asserts that these actions indicate that he was not engaged in some kind of effort to quash an investigation but was in fact pursuing the matter in a professional fashion.

In this regard the Respondent also testified that he went to [REDACTED]'s home in an effort to speak with him about the case. The suspect was not home and the Respondent left a business card. The Respondent claimed that he received a call from an attorney who said he represented [REDACTED] and told him that any conversation would go through his attorney.

This brings us to the specific points in which factual claims diverge. McGuire testified that while he could not identify his assailant, his wife did. The Respondent testified that Mrs. McGuire initially said she did not see the assailant. After McGuire failed to identify [REDACTED] he asked the Respondent to point him out in the photo array. Then he called his wife over and she said that she would testify in court that that was the man who assaulted her husband. The Respondent said that he could not and would not accept that identification as a basis for making an arrest.

The second point of contention has to do with the witness Focarile. The Respondent testified that when McGuire came in to view the photo array he told McGuire that he had been unable to contact Focarile. McGuire, the Respondent claimed, had the number written on a piece of paper and gave the information to him.

McGuire said that the Respondent did not ask about the witness and that he did not give the Respondents the witness' name or telephone number. He did acknowledge that on the day of the incident Focarile had given him his name and telephone number which was written on a piece of paper that he kept in his wallet until recently.

The third point of contention relates to the Respondent's claims that either later that day or within a few days thereafter he contacted Focarile at the number provided by McGuire. The Respondent said that he spoke to Focarile and that Focarile told him that he could not identify the assailant. The Respondent at that point recommended that the case be closed because there was no identification.

Focarile testified that he did not witness the assault and could not identify the assailant. He also claimed that he never received a call from the Respondent. Katakofsky testified that his computer review of the relevant telephone records did not show any call from the Respondent to Focarile's cellular telephone.

Thus there are three unrelated pieces of evidence, McGuire's testimony, Focarile's testimony and the absence of any recorded call to Focarile's number by the Respondent, that support the Department's assertion that the Respondent never spoke to Focarile.

But there is also countervailing evidence on these issues. As noted, it is undisputed that the Respondent called the incorrect number for Focarile on at least three occasions. There is no indication from the Respondent or Focarile that they knew each other before this event and no way could the Respondent have known this was a wrong number. There is no way for him to even know who Focarile was since the only information he had had the name spelled wrong. These then were earnest efforts to reach out to the alleged witness. Given these acknowledged efforts to contact the eyewitness at the wrong number, there is every reason to accept that he would call that witness once he had the correct number.

Further while McGuire did not recall giving the Respondent Focarile's correct telephone number he acknowledged that he had that information on a piece of paper which, until recently, he kept in his wallet. At his Official Department Interview the Respondent described the scene as follows:

I explained to him that the only way an arrest could be made is if the witness is able to tell us, and I explained to him that I've been trying to contact the witness, but I was unable to get in contact because the phone kept ringing. So he said I have the witness' number here in my wallet, and when we looked at it the number in his wallet that he had written down, was different from the 61.

Clearly the Respondent's testimony about how he got the number matches with McGuire's testimony about the paper he kept in his wallet.

The telephone records used in this case are the product of placing the computerized records provided by the telephone company through a program that Katakofsky uses to

analyze telephone data. The actual phone records were not produced in Court and none of them went into evidence. Despite the impressive discussion of LUDS and tolls and the enormous volume of records obtained, there is ample reason to find that the effort to prove a negative, i.e.: that a phone call was *not* made from the Respondent to Focarile's correct number, is not conclusive.

Katakofsky acknowledged that some quirky things happened with the telephone records, so that calls clearly made from the Squad appear to be made from the main desk. He further acknowledged that one of the telephone lines in the squad room of the precinct appeared not to have been covered by the records obtained. So it is at least possible that a call to Focarile from the precinct went undetected or that there is some other error in the telephone records or the computer analysis of them.

Proving a negative is always quite difficult and while telephone records may be effective at demonstrating that a phone call was made it is not so clear how effective they are at proving that a call was not made. Indeed, Katakofsky conceded that his analysis of phone records from the precinct do not show even one call to the incorrect number for Focarile while he concedes that the Respondent called that number at least three times. Consequently while the telephone records are certainly strong evidence they are not infallible and in this case we do not have telephone records but summaries prepared as a part of a computer analysis.

On the other hand there is strong and probably more reliable evidence that the Respondent actually did have this conversation and it is found in what the Respondent reported Focarile as having said in the conversation the Department claims never happened.

First we must look at what McGuire said about Focarile which, under the Department's theory, is all the information the Respondent would have had. McGuire testified and presumably told the Respondent that Focarile was a witness to his assault. McGuire testified that Focarile was in "the vehicle directly behind me" and that at the time of the incident Focarile had said he had seen the whole thing. But Focarile testified before this Court that he was three cars behind and more importantly that he did not actually witness the assault.

It is possible that McGuire's memory is incorrect which is not surprising given his situation when he first met Focarile a few minutes after the assault, or that Focarile has changed his story, but either way the only information the Respondent would have had was McGuire's version.

If the Respondent were trying to get rid of the case at that time the best way to have done it would have been to claim he could not reach Focarile, a statement which was true and documentable. It would have been an unreasonable risk to make up a story about a witness telling him that he could not identify the assailant only to have the witness come forward later and say that he could have. But if he did make up the story of what Focarile said he would have to work with the information McGuire provided, that the witness was in the car directly behind.

At his Official Department Interview the Respondent said that Focarile told him that he was about three cars behind McGuire, stuck in traffic and that by the time he got to the scene the assailant had left and that he had only seen him from behind and could not make an identification. That states, with almost uncanny precision, exactly what Focarile testified to at this trial. There does not seem to be any way the Respondent could have

known this at the time of his Official Department Interview unless he spoke to Focarile as he claimed.

Consequently the only reasonable conclusion that can be drawn from the evidence before this Court is that the Respondent did in fact speak to Focarile.

Focarile is an interesting individual. He certainly was a good samaritan when he came over to McGuire at a time when he was bleeding from the assault. Comforting the victim of an assault is one thing, but it is not clear why he offered to be a witness and provide his name and telephone number given that he testified that he did not see the actual assault and could not identify and did not know the assailant.

During the Respondent's Official Department Interview Katakofsky played a tape of a conversation he had with Focarile. It is quite audible on the tape of the Official Department Interview (DX 1A). On the tape Focarile can be heard to complain that no one from the precinct contacted him about the case; indeed he even seemed agitated and indignant about this. Again – why? He had absolutely nothing to add to the case.

Further, on this critical issue, Focarile seems to have recanted his claim that he did not speak to the Respondent about the case. At one point during cross-examination he indicated that it was in fact possible that he spoke to the Respondent. Focarile then went on to describe it as a “brief conversation, a 30 second conversation.” He then explained that he works nights and that he might not have recalled it because the Respondent called him during the day. He further acknowledged that he might have just said that he did not see the “gentleman” and hung up.

While there is no clear motive for Focarile to have lied, the evidence suggests that he did in fact speak to the Respondent. Whether his initial claim that he was not motivated by animus towards the police based on his prior arrest history, or has some other issue with

the police, (he did claim to know the precinct number by heart which seems a bit unusual), or he simply forgot, his testimony that he did not have a conversation with the Respondent should not be credited as there is more reliable evidence that he in fact did so.⁸

As noted previously there is no specification related directly to the conflicting claims between McGuire and the Respondent as to what happened regarding the identification of the assailant by Mrs. McGuire however some examination of what McGuire and his wife said seems necessary to fully explore the issues.

Certainly McGuire was the victim of a brutal assault by a thug. There is every reason to believe he was frustrated because everyone "knew" who assaulted him yet there was no arrest. Mrs. McGuire told Katakofsky that she had identified Londonio in the photo array but she did not appear at this trial and there was no testimony from her under oath on that issue or, more importantly, the circumstances of the identification she made.

In describing what happened when he met the Respondent to view the photo array, McGuire testified that his wife identified [REDACTED] as the assailant. This does not actually conflict with what the Respondent said; only the Respondent asserted that the identification was tainted. McGuire went on to say that he "believed" that the Respondent acknowledged that his wife had identified [REDACTED] yet they go on, according to McGuire, to discuss what further steps were going to be taken in the investigation.

McGuire is a Senior Court Clerk in the New York State court system. He should know

⁸ There is yet another version of what Focarile said about what he saw on the day of the assault. Katakofsky testified that Focarile told him that he did see the assailant as he left the scene and that he could make an identification from a profile view. This of course differs from what Focarile testified to at trial and what the Respondent claims he said. It is also different from what McGuire claims he said. The only conclusion that can be drawn from this is that Focarile has told different stories about what occurred to different people or Katakofsky made an error in reporting what Focarile said. This is significant because it indicates that either Focarile cannot be believed or Katakofsky is not the most accurate reporter of events, something the Respondent has argued impacts on the reliability of his testimony regarding the telephone records.

that once a proper identification has been made there is a basis for an arrest or at least a line-up. The fact that they then discussed further investigative steps tends to support what the Respondent said; that there was a discussion about the inappropriateness of Mrs. McGuire's identification and that the Respondent was not going to use it to make the arrest.

While McGuire insisted that he did not recall the Respondent telling him about his having difficulty reaching Focarile and that he did not recall giving the Respondent Focarile's number he also repeatedly said that the Respondent essentially ended the meeting by telling him that he would do the best he could with the information that he, McGuire, had provided. When asked, by the Assistant Department Advocate what that information was McGuire included, "the witness." The problem with that is that according to McGuire he gave information about the witness to the arresting officer at the scene and did not give it to the Respondent.⁹

At his Official Department Interview the Respondent knew that the telephone number on the original police report was wrong and he described the error saying, "I think there was just two of the last couple of numbers might have been inverted." He discovered this, he said, when he looked at the piece of paper McGuire showed him. This description is almost correct as the actual error was a difference in the third from last digit; the correct number being [REDACTED] and the wrong number being [REDACTED]. Based on the evidence before this Court, it is simply hard to imagine how the Respondent could have known the number on the police report was wrong let alone have some sense of the nature

⁹ It is worth noting that at his Official Department Interview the Respondent stated: "When he made the misidentification I said, I told him the only way the arrest was going to be made was that if the witness was able to identify him...."

of the error if McGuire did not give him that information on the day of the photo array as the Respondent claims.

Looked at another way, for the Department's assertion that the Respondent did not speak to Focarile to be correct, the Respondent would have had to guess correctly that the telephone number he had from the police report was wrong, that McGuire had a copy of the correct number on a piece of paper in his wallet, that the error in the telephone number involved a small mistake near the end of the number string, that Focarile would tell him that he was three cars behind McGuire, did not see the incident and could not identify the assailant. While this level of correct guesswork is beyond imagination it becomes even more unbelievable when one listens to the audiotape of the Official Department Interview (DX 1A). The Respondent answered questions and discusses each of these issues clearly and without hesitation. Moreover there are no inconsistencies regarding what he says about events, something that almost always happens when people are making things up. The only possible way he could have gotten so many facts right, get nothing wrong and answer question in the manner he did, is if he was telling the truth.

This then brings us to the investigative file. The Respondent has offered some evidence which tends to indicate that there was indeed someone in the 45 Precinct Detective Squad who was cooperating with Londonio and who otherwise engaged in improper activities: a detective who is retired. Certainly someone made the file disappear. This Respondent is not charged with this but it is worth considering what effect the missing file had on the Respondent.

If the Respondent were trying to "dump" the case he could easily have created a file that would protect him. He could have documented the events he claimed happened when McGuire and his wife came to view the photo array thereby establishing a written

record. The Respondent could have documented all the efforts he made to contact Focarile and closed the file out indicating that he was unable to locate this alleged witness. In fact Katakofsky indicated that there was evidence that the Respondent did try to locate Focarile. Further Katakofsky was only able to locate him through an IAB database unavailable to the Respondent (this, by the way, is yet another piece of evidence that the Respondent did in fact talk with Focarile because he could have easily explained not having been able to interview him). Having the original file would have helped the Respondent whether he was doing a proper investigation or not.

What was offered in evidence at trial (DX 2) was a re-created DD5 in which the Respondent claims to have called Focarile and learned that he could not identify the man who assaulted McGuire. This part of the report comports with what the Respondent in fact said, however the assumption that this is a complete and accurate version of the DD5 prepared by the Respondent is without any basis. In fact there is clear testimony that the Respondent did not prepare the reconstructed report that went into evidence and that it is a re-creation prepared by someone else from a computer he used. The Respondent took no part in preparing the re-created investigative file, was apparently not consulted and did not sign or acknowledge the re-created DD5s.

There is no evidence that the computer disc contained official Department records. On the contrary, there was evidence from the Respondent that the word processor used was purchased by the squad detectives themselves and was used to make it easier to prepare reports. No testimony at all was offered to suggest that the disc constituted any kind of formal record keeping mechanism and there is no testimony that finalized DD5s were formally kept on these discs. Indeed there is evidence to the contrary, as it is acknowledged that all the DD5s in the case were not found on the disc and remain missing.

What the Department has established is that the disc contained some part of the Respondent's work product and certainly the body of the text contains statements similar to those offered by the Respondent about what Focarile said. What the Department has not established is that the re-created DD5 accurately represents the actual and complete DD5 signed and submitted by the Respondent.

There are additional problems in accepting the DD5 in evidence (DX 2) as an accurate re-creation of the report the Respondent actually prepared and filed in the case. First of all, one would hope that no detective would submit such a DD5 and one would hope that no supervisor would approve it. It does not contain the name of the witness contacted or the telephone number used to contact him.¹⁰ While the only DD5s submitted in evidence are reconstructions, the one outlining the failed attempts to reach Focarile at the incorrect number listed on the police report, does list the telephone number used, so it would seem to be part of the Respondent's practice to list that kind of information.

Further this DD5 (DX 2), also closes out the case and purports to be dated July 19, 2005, which is about a week before the date the Respondent said McGuire came in to look at the photo array,¹¹ Even if the Respondent was somehow trashing the case there is no reason to believe that he would have been foolish enough to close the case out on a date that preceded the photo array. It would appear that there is at least some reason to believe the date on this re-constructed DD5 is in error and the document is therefore not a very strong or reliable piece of evidence.

This Court is aware that the Department did not charge the Respondent with intentionally dropping the case but merely lying about having called Focarile. Under that

¹⁰ This lack of a telephone number is critical and more will be said on this issue later in this decision.

¹¹ McGuire testified that he came in for the photo array about three weeks after the assault which occurred on June 30, 2005, the Respondent said the interview occurred on July 26, 2005.

theory of the case the Respondent was not venal but lazy or incompetent. Even looked at from this perspective all factors considered above still apply. Moreover there was ample evidence, provided by his current and former supervisors that the Respondent is a hard working detective and the available and uncontested evidence indicates that he did appropriate investigative work on the case.

Additionally under this theory of the case the Respondent, who was told that false statements at the Official Department Interview would cost him his job, would have risked forfeiting his job by lying about having conducted an interview rather than admitting he cut a corner by fabricating the interview; such conduct makes no sense.

The Specifications

Specification No. 2 charges that “while on duty on or about July 19, 2005” the Respondent “did wrongfully cause false entries to be made in Department records.” It then indicates that he falsely listed in a DD5 that he spoke via telephone to a witness, apparently referring to Focarile and “that the witness could not identify a perpetrator, when in truth the contact phone number contained in the DD5 did not belong to the witness.”

There are several problems with this specification. The first is that, as noted in the foregoing analysis of the facts there is not sufficient evidence to establish that the Respondent actually submitted this DD5. In fact the testimony indicates that the DD5 was re-created without any input from the Respondent. He did not sign it. He did not at any time acknowledge that it was his report.

Further as noted previously this Court finds that the Respondent did in fact speak to Focarile and that to the extent that the DD5 reports that Focarile could not identify the perpetrator - it is correct and accurate.

Last but hardly least, as noted earlier, the single DD5 put in evidence by the Department which contains the information about what Focarile said does not contain *any* telephone number. Thus the claim in the specification that, “the contact number contained in the DD5 did not belong to the witness” is simply wrong. This is not just a technical error, it indicates that the time the charges were drawn, for whatever reason, the Department believed that the Respondent claimed to dial the wrong number and speak to the eyewitness. This of course would have been further evidence that the Respondent was lying about having conducted an interview. But the factual assertion in the specification is not true. There are two copies of this document in evidence, one put in by the Department (DX 2) and one by the Respondent, (RX C), they are identical and neither one has a telephone number.

Based on the above analysis Specification No. 2 should be dismissed.

Specification No. 3 again charges the Respondent with conduct on or about July 19, 2005. It claims that he conducted an “improper investigation” when he “neglected to ascertain a witness’ correct contact number and/or attempt to locate the witness.”

Katakofsky testified that his investigation confirmed that the Respondent did several computer checks in an effort to locate contact information regarding Focarile. Identifying Focarile was not easy to do and Katakofsky acknowledged that the only way he got the information himself was through a database not available to the Respondent.

Based on that alone the Respondent should be found not guilty of this specification however, more substantively, this Court finds that he did obtain contact information for Focarile and that he did speak to him.

Therefore the Respondent is found Not Guilty of Specification No. 3.

Specification No. 4, charges that the Respondent, on the day of his Official Department Interview, May 4, 2006, "did wrongfully and without just cause prevent or interfere with an official Department investigation."

The charge is vague but apparently refers to the Respondent's insistence that he spoke to Focarile – although it might refer to the failure to accept Mrs. McGuire's alleged identification of [REDACTED] or maybe it refers to the Respondent's insistence that McGuire gave him Focarile's telephone number or maybe it refers to something else. In any event the Department offered no evidence to establish how the Respondent prevented or interfered with the investigation. Moreover, the Department's only witness on this issue provided evidence to the contrary. When asked if the Respondent interfered with any investigation Katakofsky indicated that the Respondent did not.

These factors alone are enough to justify dismissal of this specification, however so that there is no ambiguity, this Court carefully reviewed the tape and transcript of the interview along with all of the other evidence in the case. There does not appear to be anything that the Respondent said which was established to be untrue.

The Respondent is found Not Guilty of Specification No. 4.

Specification No. 5 again relates to the Official Department Interview and charges that the Respondent lied when he stated that McGuire gave him a telephone number for Focarile. It should be noted that in the end all McGuire really said was that he "did not recall" giving the Respondent the telephone number. This is not substantial enough evidence to meet the Department's burden of proof and would alone constitute a basis for finding the Respondent not guilty of this specification.

Here again, to avoid ambiguity, this Court finds that the Respondent did obtain the proper telephone number for Focarile from McGuire. If that had not occurred the

Respondent had no way of knowing that number he had was wrong, he would have had no way of knowing the nature of the error in the phone number and he had no way of knowing what in fact Focarile said about the incident. Moreover he said that McGuire got the number from a piece of paper he kept in his wallet which is just what McGuire said he did with the paper he took down Focarile's number on.

Consequently, the Respondent is found Not Guilty of Specification No. 5.

Specification No. 6 again refers to the Official Department Interview and claims that the Respondent lied when he said that he contacted Focarile. The specification notes that Focarile said that no one from the 45 Precinct Detective Squad spoke to him about the case.

There is no way of knowing why Focarile said that, but from the available evidence it appears that he was, at the very least, mistaken. The Respondent should be found Not Guilty of Specification No. 6.

The Respondent is charged in Specification No. 1 with failing to safeguard his computer code thereby allowing another member of the service to wrongfully and without just cause making inquiries in the FINEST system which were not related to official business of the Department. This charge was amended just before trial from charging the Respondent directly with making these inquiries to failing to safeguard and allowing some other member of the service to do so.

The Respondent essentially admitted to the facts in the charge as amended and denied knowledge of the fact that his code had been used. Testimony brought out by the Respondent established that another member of the service, involved in the larger investigation into the 45 Precinct Detective Squad, also let his code be used improperly in

arguably more serious manner in that someone revealed the presence of an undercover vehicle. The Respondent notes that that member did not even receive charges.

The fact that one person is not charged is not a defense and there may have been significant reasons why that occurred. In any event that is beyond the scope of this inquiry.

The Respondent is found Guilty of Specification No. 1.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222 (1974).

The Respondent was appointed to the Department on April 30, 1991. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Department had every reason and every responsibility to investigate activities at the 45 Precinct Detective Squad. It had every reason and every responsibility to investigate and indeed bring charges against this Respondent. There were several seemingly strong pieces of evidence to indicate that the Respondent lied when he said that he interviewed Focarile: Focarile's claim that he was not interviewed and the apparent absence of any phone record to confirm a call and McGuire's testimony that he did not provide Focarile's telephone number. Moreover there was the uncharged but very real and stigmatizing concern that he had improperly closed an investigation of an organized crime figure. The matter required a full hearing on the facts.

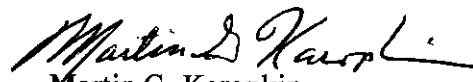
Based on the evidence before this Court it has found that the allegations both directly made and implied cannot be sustained. Indeed the evidence before this Court indicates that the Respondent handled the assault investigation reasonably and properly.

The Respondent was the subject of an intensive and extensive investigation which turned up no evidence of corruption or organized crime connection on the part of the Respondent. It would appear that the Respondent got caught up in a major corruption investigation because of the misconduct of someone else.

While there is no excuse for allowing his computer code to be used by someone else, the penalty, it seems, should be tempered by the entire circumstances of this incident. There are also two elements of his conduct that merit special consideration. First, he stood up to McGuire and refused to take police action on the improper identification of Londonio. Second, he was steadfast at the Official Department Interview. He was asked more than once if he was telling the truth and it might have been easier to "take a hit" for something he didn't do than chance his job on telling the truth. As noted above, there is every indication that the story he clung to so tenaciously was the truth and in doing so he did what we would expect every officer to do at an Official Department Interview.

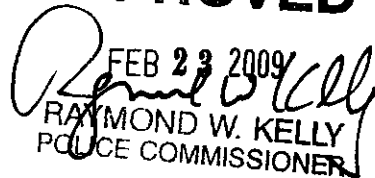
Consequently I recommend that on the one charge, Specification No. 1, which has been sustained, the Respondent forfeit five vacation days.

Respectfully submitted,



Martin G. Karopkin
Deputy Commissioner-Trials

APPROVED



FEB 23 2009
RAYMOND W. KELLY
POLICE COMMISSIONER